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No. 686

In the Supreme Court of the United States

OCTOBER TERM, 1935

FRED O. MORGAN, DOING BUSINESS AS FRED O. MORGAN SHEEP COMMISSION COMPANY, ET AL., APPELLANTS

v.

THE UNITED STATES OF AMERICA AND THE SECRETARY OF AGRICULTURE

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI

BRIEF FOR THE UNITED STATES AND THE SECRETARY OF AGRICULTURE

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OPINION BELOW

The opinion of the District Court of the United States for the Western District of Missouri (R. 145) is reported in 8 F. Supp. 766. The opinion denying appellants' petition for rehearing (R. 164) is not reported.

JURISDICTION

The decree of the District Court was entered on June 20, 1935 (R. 166). Petition for appeal was

filed on June 29, 1935 (R. 168–176), and was allowed on the same day (R. 177–178).

The jurisdiction of this Court is derived from Section 316 of the Packers and Stockyards Act, 1921, c. 64, 42 Stat. 159, 168 (U. S. C., Tit. 7, Sec. 217), which provides that:

> * * * the provisions of all laws relating to the suspending or restraining the enforcement, operation, or execution of, or the setting aside in whole or in part the orders of the Interstate Commerce Commission, are made applicable to the jurisdiction, powers, and duties of the Secretary in enforcing the provisions of this title, and to any person subject to the provisions of this title.

Judicial review of the orders of the Interstate Commerce Commission was originally provided for by Section 1 of the Act of June 18, 1910, c. 309, 36 Stat. 539, commonly known as the Commerce Court Act, which conferred jurisdiction upon the Commerce Court over "Cases brought to enjoin, set aside, annul, or suspend in whole or in part any order of the Interstate Commerce Commission." The Urgent Deficiencies Act of October 22, 1913, c. 32, 38 Stat. 208, 219 (U. S. C., Tit. 28, Secs. 41 (28), 47), transferred the jurisdiction of the Commerce Court to the several District Courts of the United States, and provided that all suits to suspend or set aside an order of the Interstate Commerce Commission should be heard by three judges. Provision was made by the said Urgent Deficiencies

Act for direct appeal to this Court (U. S. C., Tit. 28, Secs. 47, 345 (4)).

QUESTIONS PRESENTED

1. Whether appellants have raised by their pleadings and proof the question of the alleged confiscatory operation of the rates prescribed by the Secretary.

2. Whether the method of rate-making employed by the Secretary is lawful.

3. Whether there is substantial evidence to support the Secretary's findings as to the reasonable costs of salesmanship.

4. Whether there is substantial evidence to support the Secretary's findings as to the reasonable costs of getting and maintaining business.

5. Whether there is substantial evidence to support the Secretary's findings as to the various other unit costs, including yarding salaries and office salaries.

6. Whether there is substantial evidence to support the Secretary's findings as to reasonable compensation for owners of the market agencies.

7. Whether the Secretary's finding that existing rates were unreasonable is supported by sufficient evidentiary findings.

8. Whether appellants were accorded a full and fair hearing by the Secretary of Agriculture as required by the Packers and Stockyards Act.

STATUTES INVOLVED

The pertinent provisions of the Packers and Stockyards Act, 1921, are set out in Appendix A, *infra, pages* 184–188.

STATEMENT

This is an appeal from a joint and final decree of a statutory three-judge court for the Western District of Missouri entered on June 20, 1935 (R. 166), dismissing petitions in fifty suits which the fifty appellants herein each separately instituted to enjoin respondents from enforcing an order of the Secretary of Agriculture dated June 14, 1933 (R. 23–130), fixing the maximum rates chargeable by market agencies for selling and buying livestock at the Kansas City Stock Yards in Kansas City, Missouri, and Kansas City, Kansas.

Appellants are "market agencies" as defined in the Packers and Stockyards Act (R. 1–2) engaged in the business of buying and selling livestock on commission at the Kansas City Stock Yards located in a district known as the West Bottoms lying partly in Kansas City, Missouri, and partly in Kansas City, Kansas (R. 41).

On April 7, 1930, the Secretary of Agriculture issued an order of inquiry and notice of hearing with respect to the lawfulness and reasonableness of the rates and charges collected by the various commission firms operating at the Kansas City market (R. 26). Pursuant to the notice, a hearing

was held before an examiner at Kansas City, Missouri, beginning December 3, 1930 (R. 27). Voluminous testimony was taken with respect to all the questions pertinent to the determination of fair and reasonable rates. The testimony taken at this hearing is printed in narrative form in the record (R. 199–701). Numerous exhibits, including audits of appellants' books for 1929, cost studies made from those audits by expert accountants, etc., were introduced into evidence by the Government and appellants. The hearing was concluded on February 10, 1931. On March 27, 1931, oral argument was heard by the Acting Secretary of Agriculture, and subsequently appellants submitted briefs (R. 2, 28).

On May 11, 1932, while the matter was still pending before the Secretary and before he had made any order, appellants filed a new schedule of rates designated as Schedule 3 (R. 3). On May 18, 1932, the Secretary of Agriculture issued his findings and order prescribing maximum reasonable rates to be charged by appellants (R. 28, 29).

On May 26, 1932, appellants, alleging economic changes since the test year of 1929, filed a petition for rehearing before the Secretary which, in view of the decisions in *Atchison, Topeka & Santa Fe Ry. Co.* v. *United States,* 284 U. S. 248, and *St. Joseph Stock Yards Co.* v. *United States,* 58 F. (2d) 290, the Secretary granted on July 15, 1932 (R. 29–30).

The rehearing was commenced before an examiner at Kansas City, Missouri, on October 6, 1932 (R. 30). All the testimony and exhibits introduced at the first hearing were put in evidence (R. 33), and a large amount of additional testimony and many new exhibits were presented by appellants and the Government. The testimony taken at the rehearing is printed in narrative form in the record (R. 702–1095). The hearing was concluded on November 16, 1932 (R. 30), and on March 24, 1933, oral argument was heard by the Acting Secretary of Agriculture (R. 3, 33).

On June 14, 1933, the Secretary issued his findings and order prescribing the maximum rates which are under attack in this case (R. 23–130). Appellants filed a petition for another rehearing before the Secretary on July 5, 1933, and the Secretary issued an order denying the same on July 6, 1933 (R. 3).

On July 19, 1933, the appellants each filed separate petitions in the District Court to enjoin enforcement of the order (R. 1–130B). The petitions contained the customary prayer for convoking a three-judge court, and asked for a temporary injunction and a permanent injunction against enforcement of the order (R. 22). A three-judge court was convened and, with the consent of the Government, the court entered a temporary restraining order conditioned on appellants' depositing with the court the amounts collected in excess

of the prescribed rates (R. 131). The temporary restraining order was subsequently continued with consent of the Government (R. 136).

On motion filed by appellees (R. 133), the District Court struck from the several petitions those portions alleging that appellants were not granted a proper hearing by the Secretary of Agriculture and that the Secretary improperly denied appellants a second rehearing after entry of the order challenged herein (R. 137). Appellees then answered on November 25, 1933 (R. 138), and the cases subsequently proceeded to trial.

The evidence before the court consisted of the abstract of the record and exhibits in evidence at the two hearings before the Secretary (R. 199, 1094). Appellants also offered additional evidence (R. 181–196),[1] which was received over appellees' objection that it did not properly relate to the issue of confiscation (R. 181).

On October 29, 1934, the District Court rendered an opinion and entered findings of fact and conclusions of law (R. 145–157) upholding the order of the Secretary and rejecting all of appellants' contentions. The court found that the findings of fact made by the Secretary were supported by substantial evidence and, on an independent consideration of the evidence received by the Secretary and

[1] This evidence was the testimony of appellants' accountant, J. W. Roberts, and certain exhibits prepared by him which have been printed in the appendix to the record.

of the evidence received by the court, adopted in its findings the findings of the Secretary (R. 153). Separate decrees were filed on December 20, 1934 (R. 157). Appellants, on the same day, filed a petition for rehearing (R. 159). On June 15, 1935, the parties entered into a stipulation consolidating the separate suits (R. 163). The petition for rehearing was denied in an order and memorandum opinion filed June 20, 1935 (R. 164, 166). The order also set aside the separate decrees and included a final consolidated decree (R. 167).

An appeal to this Court was allowed on June 29, 1935 (R. 177) and a supersedeas was granted on the same day (R. 178). The narrative statement of the evidence was approved by the District Court (R. 1095) and the parties stipulated that certain exhibits should be certified to this Court as original exhibits (R. 1096). Those exhibits have been certified to this Court, pursuant to Rule 10, paragraph 4, and it has been stipulated that they may be referred to by both parties.

The pertinent facts in this case are set out in the findings of the Secretary (R. 23–130). Since these facts are voluminous and must be discussed in connection with the argument, further recital will be left to portions of the brief devoted to argument.

SUMMARY OF ARGUMENT

I

The duty imposed upon the Secretary of Agriculture by the Packers and Stockyards Act of 1921

of fixing reasonable rates for services rendered by market agencies necessarily requires him to determine what costs and profits should be regarded as reasonable. The allowances for costs and profits used by the Secretary as a basis for prescribing a schedule of maximum reasonable rates need be only high enough to cover reasonable costs and profits rather than actual costs, which may be unreasonably high. If, as a result of unreasonably high existing rates, there are more agencies doing business on the market than the volume of business coming to the market warrants, the fact that, as an incidental result of prescribing reasonable rates, some agencies may be unable to continue in business does not invalidate the rates prescribed nor tend to prove that they are unlawful. It follows that the reasonableness of the rates prescribed by the Secretary is not to be tested by applying those rates to the actual costs incurred by appellants.

II

In fixing maximum market agency rates for the Kansas City market the Secretary made a specific allowance for interest upon capital, and that allowance is not challenged by appellants. There is no issue of confiscation in this case. Appellants' contention that the prescribed rates are confiscatory because they will not cover the costs incurred by, and in addition provide a profit for, each market agency now operating in the Kansas City market,

is without merit because (a) all established criteria of confiscation are inapplicable to rates charged for the sale of personal services, and (b) the Constitution does not guarantee to all persons engaged in a business rates high enough to cover their actual costs and a profit nor does it guarantee to each of them that his business may not be reduced or destroyed as a normal result of competition. Therefore, this case does not present the constitutional issue of confiscation and if the findings of the Secretary are supported by substantial evidence they should be upheld.

III

The arguments advanced by appellants based upon (a) their endeavor to test the rates by applying them to appellants' past actual costs irrespective of the reasonableness of those costs, (b) their assumption that a showing that past actual costs will not be covered in some instances is a showing of confiscation, and (c) their assumption that there is or can be any question of confiscation in this case, are inapplicable and beside the point, and, therefore, there is no merit in appellants' contention that the prescribed rates are "ruinous" in their effect upon appellants' businesses.

IV

The method used by the Secretary in determining and prescribing maximum rates to be charged by the Kansas City market agencies was in all

material respects the same as the method used by him in determining and prescribing maximum rates to be charged by the Omaha market agencies. The method used by him at Omaha has been approved by this Court in the case of *Tagg Bros. & Moorhead* v. *United States,* 280 U. S. 420. Therefore, the method used by the Secretary at Kansas City and involved in this case is lawful.

V

There can be no contention that the maximum rates prescribed by the Secretary will not yield the reasonable costs and profits found by the Secretary. As a matter of fact, application of the rates to the business done by the agencies at the Kansas City market in 1931 would have produced a margin or "cushion" of $150,212.91 over and above such reasonable costs and profits.

VI

The Secretary found and the record shows that costs incurred in the market agency business as it was conducted at Kansas City in 1931 naturally fell into two groups: (1) costs which the conditions of the business tend to increase, i. e., salesmanship and business getting and maintaining; and (2) costs which the conditions of the business tend to keep down, i. e., yarding salaries, office salaries, yarding expenses, office expenses, administrative and general expenses, insurance and interest on investment.

The allowance made by the Secretary to be covered into rates on account of salesmanship is amply supported by uncontradicted testimony from well-qualified witnesses, by evidence of actual accomplishments at the market, and by evidence that actual costs at the market were excessive and the number of agencies greater than the volume of business warranted.

The allowance made by the Secretary to be covered into rates on account of costs of business getting and maintaining is supported by ample evidence of abnormal competitive conditions at the Kansas City market, abnormal and widely varying expenses and methods of getting and maintaining business, actual accomplishments at the market, and wasteful and extravagant actual expenses (borne unequally by different classes of livestock producers).

The Secretary's findings and allowances on account of the class of costs designated by him as costs which the conditions of the business tend to keep down are supported by ample evidence, particularly by statistical demonstration that such allowances, if applied to the actual business of the agencies in 1931, would have produced revenue substantially more than enough to cover the actual out-of-pocket expenses of appellants for 1931 for yarding salaries, yarding expenses, office salaries, office expenses, administrative and general ex-

penses, insurance, and interest on investment (including additional accruals for interest on investment not shown by appellants' books as expenditures and insurance allowances to some firms which did not carry reasonable insurance).

The Secretary's allowance for return to the owners of the market agencies, including compensation for management and the carrying of uninsurable risks, is amply supported by the evidence and is not challenged by appellants in their brief.

Therefore, the findings and allowances of the Secretary with respect to functional unit costs and profit are reasonable and are amply supported by the evidence.

VII

The Secretary made a legally sufficient finding that the existing rates are unreasonably high. The Secretary found that the existing rates and charges are unreasonable and unjustly discriminatory, and this ultimate finding is fully supported by lengthy and detailed evidentiary findings which disclose the facts and methods which the Secretary used in reaching his ultimate conclusion.

VIII

In the rate proceeding here in question, appellants were afforded a full and fair hearing after due notice and the Secretary regularly exercised

the authority granted to him by statute; therefore, the appellants have not been denied due process of law.

ARGUMENT

I

APPELLANTS' INSISTENCE ON RATES WHICH WILL COVER ACTUAL COSTS IS UNWARRANTED IN PRINCIPLE AND IS DESIGNED TO DEFEAT AND NULLIFY THE RATE-MAKING POWER CONFERRED BY THE PACKERS AND STOCKYARDS ACT

The business in which appellants are engaged at the Kansas City stockyards is in all essential respects similar to that in which the appellants in the case of *Tagg Bros. & Moorhead* v. *United States,* 280 U. S. 420, were engaged at the Omaha stockyards. Appellants here, as was also the case with the appellants in the *Tagg Bros. & Moorhead* case, have eliminated rate competition; instead, they charge uniform rates fixed without consulting the shippers and others who pay the rates. Originally the rules of the Kansas City Live Stock Exchange, to which appellants belong, provided a schedule of commissions applicable to all members (Gov. Ex. 9, pp. 46–50). Notwithstanding the fact that it does not definitely appear from the record that this rule has ever been amended, on May 11, 1932, all of appellants severally filed a tariff of uniform selling rates and charges to become effective May 23, 1932 (R. 64). Although each appellant physi-

cally submitted a separate schedule, the tariff of rates contained in each was the same.[2]

The Packers and Stockyards Act vests in the Secretary of Agriculture the responsibility of keeping the rates and charges collected by livestock market agencies for their personal services within reasonable bounds. Section 310 of the Act provides *inter alia* that whenever the Secretary, after hearing under an order for investigation and hearing, is of the opinion that any rate, charge, regulation, or practice of a market agency is or will be unjust, unreasonable, or discriminatory, the Secretary may determine and prescribe what will be the just and reasonable rate or charge to be thereafter observed in such case, or the maximum or minimum to be charged. This power was granted to the Secretary in order to protect the shippers of livestock from the necessity of paying unjust, unreasonable, or discriminatory rates for market agency services at stockyards subject to the Act. Although shippers are free, in theory, to use the facilities of the markets without making

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[2] The Secretary of the Exchange testified with respect to the uniform schedules filed by appellants in May 1932:

> I believe the tariffs now in effect and charged by the members of the Exchange are uniform with the exception that they are not all uniform as to buying. As to selling they are uniform. I know of no agreement or arrangement whereby they were made uniform. That is just a coincidence. [R. 708.]

That the filing of approximately fifty schedules, all containing the same selling rates, was not a mere coincidence is, however, an inescapable inference from other testimony in the record (R. 843, 908, 1086–1088).

use of the services of market agencies, as a practical matter, this course is impossible, and they must perforce sell through the market agencies. As the livestock markets of this country are now organized, the shippers of livestock have no bargaining power with respect to the commissions that they shall pay to market agencies. Inasmuch as rate competition has been eliminated by the market agencies themselves, the only check upon the imposition of unreasonable rates is that imposed by regulation. Bargaining in any real sense between the individual shipper and the market agencies with respect to commissions is impossible. It was because of these circumstances that Congress provided for regulation of market agency rates by the Secretary of Agriculture to protect the interests of the shippers and the public, and to prevent unreasonable rates from becoming a burden upon interstate commerce. The constitutionality of such regulation has been sustained by this Court in *Tagg Bros. & Moorhead* v. *United States*, 280 U. S. 420, and it is not challenged in this case.[3]

The Packers and Stockyards Act was approved August 15, 1921. Within a year after the Act became effective, a formal complaint was filed with the Secretary by the American National Livestock Association and fourteen other associations of livestock producers, alleging, among other things, that

[3] Appellants expressly concede the constitutionality of such regulation (appellants' brief, p. 81).

the commission charges assessed and collected by the market agencies for selling livestock at the stockyards located at Kansas City, Omaha, St. Paul, and Chicago were unjust, unreasonable, and discriminatory. Before a hearing was ordered on this complaint, a conference was held between representatives of the market agencies at the Kansas City market and representatives of various livestock organizations which resulted in a proposal that the issue in dispute be settled by arbitration. The conference nominated arbitrators whom the Secretary approved. Subsequently, the arbitration plan was also adopted by the market agencies at Omaha, St. Paul, and Chicago, and the arbitrators proceeded with their duties (Resp. Ex. 24, pp. 1–3). These arbitrators made extensive personal investigations of conditions at the various stockyards, as a result of which they agreed upon a recommendation that the schedules of rates and charges then in effect at the several stockyards under investigation be amended in certain particulars. Their recommendation included a separate schedule of rates for Chicago, Kansas City, Omaha, and St. Paul (Resp. Ex. 24, pp. 13–28). The rates recommended as a result of this arbitration were approved by the Secretary and accepted by the market agencies at the several stockyards involved. At the Kansas City stockyards those rates remained in effect without material change until 1932 (R. 64, 216).

The arbitration award shows that the same proceeding affected the rates at Kansas City and those at Omaha (Resp. Ex. 24). The record in the *Tagg Bros. & Moorhead* case shows that following the award of the arbitrators, the rates collected for market agency services at the Omaha stockyards for several years were those recommended in the award (*Tagg Bros. & Moorhead,* R. 10–13). Several years after the award, however, the market agencies at Omaha filed a new tariff containing higher rates and charges, and it was the filing of the new tariff which caused the administrative inquiry that resulted in the order that was attacked by the market agencies in the *Tagg Bros. & Moorhead* case. In this respect again, the facts in the Omaha situation were very similar to those in the instant case. The appellants in the instant case observed without material change the rates provided in the award of the arbitrators until 1932 when, prior to the rehearing, appellants filed a new schedule of rates and charges (R. 28–29, 64–68), which, among other things, was the subject of the inquiry at the rehearing (R. 30). It is plain, therefore, that although the appellants in the instant case observed for a longer period the rates recommended by the arbitrators than did the market agencies doing business at Omaha, the history of the rate proceedings at the two markets is otherwise substantially the same.

When the inquiry in this case was initiated, the Secretary was faced with the same problem with which he was faced in the proceedings at Omaha, namely, the problem of determining upon a schedule of maximum rates which would be fair and reasonable both to the shippers of live-stock and to the market agencies. Inasmuch as appellants are engaged in rendering personal services and, admittedly, employ very little capital in their business, the task of the Secretary was principally one of determining upon the reasonable costs of performing those services and a reasonable profit therefor, taking into account as well the value of the service. The problem was difficult because of the numerous firms involved, no two of which had a uniform business experience. The execution of the Secretary's duty under the Act required him to determine the reasonable costs and profits which the rates should be high enough to cover for firms whose personnel differed in its length of experience, relative aptitude for work, individual industry, and capacity to attract and keep business. The problem was further complicated by the existence of abnormal competition among appellants for the business coming to the Kansas City stockyards—competition which has not resulted in any decrease in rates to the shippers, because uniform rates have been maintained by all appellants, but which under the protection of such uniform rates has mani-

fested itself in an increase in costs without any increase in business.

Although there has been a gradual but fairly steady reduction in receipts at the Kansas City stockyards over a period of years (R. 516), the reduction in volume has not been accompanied with any corresponding reduction in the size of the market agency organizations or in their overheads (see p. 96, *infra*). Indeed, the record in this case discloses that the more important items of cost have mounted with the reduction in volume of receipts coming to the market. Although the business of the market as a whole has fallen off, the number of firms has shown no substantial decrease, with the result that the rates charged have been high enough to maintain in business a larger number of firms than is necessary to handle the decreased volume of livestock.

THERE IS NO BASIS FOR APPELLANTS' CONTENTION THAT THE SECRETARY MUST FIX RATES WHICH WILL PRESERVE ALL OF THE EXISTING MARKET AGENCIES

It is true, as appellants state, that the Secretary of Agriculture has no power under the Packers and Stockyards Act to limit the number of market agencies doing business at the stockyards (appellants' brief, pp. 3–4). It is also true, as appellants state, that nothing in the nature of a certificate of public convenience and necessity is required for entry into the market agency business and that the Act contemplates that market agencies may engage in the

business without restriction by the livestock exchanges. But the Act does authorize the Secretary to fix *reasonable rates.* If there are more market agencies operating at a given market than are necessary to handle the volume of business in a reasonably efficient manner and if, in connection with that condition, costs and rates are maintained at an unreasonably high level, the practical result of an order by the Secretary fixing reasonable rates may well be to limit the number of agencies which can continue to operate. Congress must have intended this result because otherwise its gift of power to prescribe reasonable rates would have been an empty gesture. The preservation of all existing market agencies cannot be a condition of the proper exercise of the Secretary's rate-making power, because, if this were true, rates would be determined by the number of market agencies in existence at the time of entry of the rate order, and not by the Secretary's findings of reasonableness. The Act therefore contemplates that any person may engage in the market agency business and compete with others for that business, but only under reasonable rates, and it expressly vests in the Secretary of Agriculture the power to determine what are reasonable rates.

Appellants' whole argument is premised upon a palpable and fundamental misconstruction of the Secretary's rate-making power and of his purposes as expressed in the order attacked in this case.

Appellants seem to contend that since the Act does not expressly confer upon the Secretary the power to reduce the number of market agencies, he cannot fix rates which might in practice accomplish what he is not authorized to do directly; that the Act contemplates a competitive market and that therefore the Secretary canot make an order which may have the effect of eliminating some of the competitors; that the effect of the Act and the Secretary's interpretation thereof has been to encourage participation in the business by any one who desires to participate therein, and that a rate order which may eliminate some persons desiring to engage in the market agency business is therefore inconsistent with the Act and the Secretary's own interpretation of it, and is *ultra vires;* that the whole order challenged herein is grounded upon the Secretary's opinion that there are too many market agencies and too much competition in the business and that he has set about to prescribe rates which will accomplish his allegedly illegal purpose to reduce the number of market agencies competing for the business at the Kansas City stockyards. Appellants do not attempt to press the logic of this argument to its inevitable conclusion, that is, that the Secretary has no authority to make a rate order which does not preserve all existing market agencies. The prudence of this forbearance is obvious because the mere statement of that conclusion exposes the fallacy of the premise from which the whole argument proceeds.

Of course it is patent that under any schedule of reasonable rates there would be firms whose lack of efficiency or inability to get business would compel retirement from the competitive field. It is likewise obvious that if the Secretary's rate-making power were to be construed to require the fixing of rates high enough to preserve in the competitive race all comers to the market, the only manner in which his power ever could be exercised would be to order rate increases from time to time upon showings of deficits by marginal firms. Any order to reduce rates, no matter how exorbitant or unreasonable they might be, would always necessarily have the effect of eliminating some of the marginal firms unless those firms could make reductions in costs or acquire more business.

So appellants are plainly in error when they contend that the Secretary's rate-making power is limited by his lack of authority to prescribe or reduce the number of agencies that may do business on the market. Appellants' argument in this respect is simply an attempt to nullify the rate-making power over market agencies.

Granted that one of the purposes of the Act is to promote fair competition at the stockyards and to free them from monopolistic and discriminatory practices, it does not follow that the Act is designed to assure the maintenance in competition of every market agency regardless of its capacity to attract sufficient business to support it at a profit. *What*

the Act seeks to accomplish is the maintenance in competition, free from unjust, unreasonable, and discriminatory practices, of those firms which can operate under just, reasonable, and non-discriminatory rates. It is the Secretary's duty under the Act to determine upon sufficient evidence what those rates are, and to order that market agencies shall not publish, demand, or collect rates that are not just, reasonable, and non-discriminatory. If an order of the Secretary prescribing a schedule of maximum reasonable rates is entered pursuant to the statute and after a fair hearing and if it is supported by the findings and by sufficient evidence, it is lawful irrespective of whether there may be some or many firms in business that would incidentally be eliminated from the competitive struggle unless they reduced their costs.

While the Secretary is not authorized to expressly prescribe or limit by his order the number of firms that may engage in the market agency business, he is under a duty to take cognizance of evidence tending to show that under present competitive conditions at the market certain costs actually incurred are unreasonable and are not to be accepted as conclusive on the question of what are reasonable costs. The Secretary's duty of determining what are just and reasonable rates in fact requires him to give consideration to evidence of the excessiveness of certain costs where such evidence is found. If such evidence shows that there

are many market agencies not receiving a sufficient volume of business to entitle their costs to be regarded as reasonable, the Secretary is required to take cognizance of that fact. Such evidence, in view of the conditions under which appellants' business is carried on, goes to the very heart of the problem of determining upon a schedule of maximum reasonable rates. If the Secretary were to ignore such evidence and to proceed upon the assumption that the costs of all of the agencies doing business must necessarily be covered by any rate order made, the necessary result always would be either the approval of existing rates or an order increasing them. If the Secretary must be blind to evidence indicating an over-manned condition on the market with consequent excessive costs per unit of service, then plainly his hands are tied, since rates would always have to cover actual costs no matter how excessive.

Since the Secretary was fully apprized of the fundamental nature of the problem by the record in this case, he made certain findings with respect to the inadequacy of the present business at the stockyards to support economically all of the firms now striving to make a profit (R. 90–91). These findings were directly pertinent to the matter of determining reasonable costs. There is nothing in the order, however, to suggest that the Secretary's primary purpose was to reduce the number of firms engaged in business, or that he in any

way exceeded his statutory power. Appellants patently mistate the Secretary's position when they say that "The rates prescribed were clearly made as low as they were for the purpose of limiting the number which might successfully engage in the business" (appellants' brief, p. 93). It is this misstatement of what the Secretary did which furnishes the basis for most of appellants' argument that his order exceeds his statutory power.

THE APPLICATION OF THE PRESCRIBED RATES TO THE PRESENT UNREASONABLE COSTS INCURRED BY APPELLANTS FURNISHES NO CRITERION OF THE REASONABLENESS OF THE PRESCRIBED RATES

In the discussion of the evidence which will later follow, particularly the evidence with respect to salesmanship and business getting and maintaining costs, it will appear that in appellants' business the actual costs depend largely upon what the rates are, and that whether or not certain costs will be incurred depends largely upon whether the rates are high enough to bear them. In a public utility employing a large capital investment, many of the costs are relatively fixed and must be incurred irrespective of fluctuations in business. If prescribed rates are not high enough over a period of time to permit the payment of necessary costs in such a business, confiscation of property results. Here, however, in appellants' business, practically nothing but personal service is involved. If rates are high, salaries (the largest item of cost) will tend to

range higher and business getting costs will increase. If rates are low, salaries and business getting costs will tend to decrease. The majority of costs being flexible, market agencies will tend to bring themselves within the economically permissible range of costs under any rate schedule. Thus, costs are in fact controlled by rates. If appellants' suggestion is accepted that rates must be prescribed which will cover existing costs, a situation will follow in which existing rates will control the rate-making authority instead of that authority controlling the rates.

As will later appear, the Secretary has found upon sufficient evidence that as to certain of the costs incurred by appellants, the conditions of the business tend to hold them down. As to these costs, the normal actual costs may furnish a fair criterion of reasonableness. As to certain other costs (salesmanship and business getting and maintaining), the conditions of business as carried on at the Kansas City stockyards tend to increase such costs beyond reasonable bounds. As to these latter costs, past costs as actually incurred do not present a fair criterion of reasonableness. Some other guide in the determination of reasonableness as to such costs must be found, and the guide which the Secretary followed in determining upon a fair allowance for salesmanship and business getting and maintaining costs will later be considered in detail. It is enough at this point to say that if the evidence

establishes the reasonableness of the cost allowances for salesmanship and business getting and maintaining, those allowances are not insufficient merely because appellants under their present conditions of operation, are failing to perform these functions for a reasonable cost. Obviously, reasonable rates cannot be predicated upon unreasonable costs. The past actual costs incurred by appellants do not in and of themselves furnish a proper standard of reasonable costs, but they must be adjusted and corrected to eliminate so far as possible those factors which have in the past made costs unreasonable.

It will later be shown that the maximum rates prescribed in the order challenged in this case would have produced if applied to the volume of business received in 1931 approximately $150,212.91 in excess of the costs found by the Secretary to be reasonable for all species of livestock for the market as a whole. Appellants have made no claim in this litigation, either separately or jointly, that the rates would not adequately cover the costs and profits found by the Secretary to be reasonable, with a substantial margin besides for each and all of them. Since there is no issue in the case as to the adequacy of the rates to yield the costs and profits found to be reasonable, the issue is whether the findings of the Secretary as to reasonable costs and profits are in fact reasonable and supported by substantial evidence.

Not only are the prescribed rates more than adequate to cover the costs and profits found by the Secretary to be reasonable, but, according to appellants' own computation (based upon Pet. Ex. 4; appellants' brief, p. 56), 26 out of 43 firms would have earned in 1931 under the Secretary's rates a net compensation for owners over and above costs without making any reduction in costs at all. While such net compensation as shown in appellants' computation is very low for several of the firms, the fact that a majority of the firms could have earned net compensation for owners at all demonstrates that a majority of the firms could have operated in 1931 under the prescribed rates without sustaining a loss and *without making any reduction whatever in costs.*

It is particularly significant that the rates produce this result even though they were not intended to provide revenue sufficient to yield a profit over and above the unreasonable costs actually incurred by appellants. Thus, even if we ignore the fallacy of the premise upon which appellants' argument rests, the table on page 56 of appellants' brief is striking proof of the reasonableness of the rates which the Secretary has fixed, because it shows that if those rates had been applied in 1931, a majority of the firms, even under the present conditions of unreasonable and extravagant costs would have re-

alized some return for their owners. But if the facts disclosed by the table were different from what they are, there would still be no merit in appellants' argument. Even if the table showed that not one of the market agencies could maintain the present level of unreasonable costs and make a profit under the Secretary's rates, that demonstration would in itself have no significance. The reasonableness of the rates is not to be tested by their application to appellants' actual costs for any given period, because the reasonableness of those costs is in itself the principal issue involved in the determination of reasonable rates. Therefore, whether the application of the prescribed rates to the actual costs incurred by appellants during any given period would produce, as to any or all of them, a profit or a deficit is beside the point.

A fair rate order conceivably might cover the costs actually incurred by all of the market agencies, or it might not cover the actual costs of any of them, depending upon the reasonableness or unreasonableness of their costs. The adequacy of rates to cover actual costs, therefore, is not and cannot be a test of reasonableness, either as to individual firms or as to groups of firms.

The test of the reasonableness of prescribed rates is whether or not they make adequate allowance for reasonable costs of conducting the business and a reasonable profit, and that question is to be resolved not by applying the rates to the

actual costs of all or any of the firms, but rather by examining the constituent cost findings upon which the prescribed rates are predicated to ascertain whether each of those constituent cost findings is reasonable in the light of the evidence, and whether the rates are adequate to yield a reasonable profit over and above such costs. It is solely a question in the final analysis of whether or not the evidence adequately supports the findings as to reasonable costs and reasonable profits. If such findings are adequately supported and the rates prescribed are sufficient to yield the costs and profits found to be reasonable, those rates must be reasonable irrespective of how they may affect particular market agencies or groups of agencies. If particular market agencies or groups of agencies cannot operate successfully under such a schedule of rates, it would seem to indicate that the fault is in the market agencies and not in the rates.

Appellants must admit that a market agency could not reasonably expect to earn a year's expenses and anything like a full year's salary or profit for the owner from the handling of a single car of livestock per year. This being true, the question arises whether it is reasonable to expect that this result can be reached from the handling of 10 cars or 50 cars or 100 cars. Somebody must decide what constitutes a reasonable year's work for the earning of a reasonable year's salary, in order to determine what rates are reasonable.

This duty rests under the law upon the Secretary of Agriculture, and in his findings in this case he has made such a determination.

Later appellees will discuss the reasonableness of the Secretary's findings in this case and the adequacy of the evidence to support them, which is the only real question presented by this appeal. The point which appellees now make, however, is that facts with respect to whether the prescribed maximum rates will cover the actual costs have no probative force in determining the reasonableness of the prescribed rates.

II

This Case Does Not Present Any Issue of Confiscation

Appellants contend that the effect of the prescribed rates upon their businesses, severally and collectively, demonstrates that the order is confiscatory (appellants' brief, pp. 48–80).

In Section VIII of their petitions filed in the District Court appellants attempted to raise the issue of confiscation by alleging in each petition the specific amount by which the gross revenue under the prescribed rates, if they had been in effect in 1931, would have failed to cover the "total calculable costs"[4] incurred by the petitioner during that

[4] "Total calculable costs" is the term used by appellants in their respective petitions. Appellants apparently include in "total calculable costs," all out-of-pocket expenses, interest on capital, accruals, and appraisals of the value of the services of the owners. (See Resp. Ex. 207.)

year; the percentage by which the gross yield of the petitioner in each case had increased or declined under the existing rates during the year 1932 as compared with 1931 and during the first five months of 1933 as compared with the first five months of 1932; and the percentage of increase or reduction which the prescribed rates would cause in the revenue of each petitioner from each species. Allegations were also made with respect to the number of appellants who would sustain operating deficits under the prescribed rates and the aggregate amount that would be available under the prescribed rates for compensation to all of the owners. Each petitioner further alleged the amount that would be available under the prescribed rates for owner compensation in the case of the petitioner and also what the alleged reasonable compensation for the owner or owners of the petitioner would be. It was alleged in all of the petitions in general terms that the prescribed rates were individually and severally confiscatory as applied separately to calves, yearlings, cattle, hogs, and sheep, and that each and all of the rates would fail to yield the petitioner a fair and compensatory return for stockyard services rendered by such petitioner (R. 18–20).

Appellants have contended throughout this litigation that they have properly raised the issue of confiscation by the allegations made in Section VIII of their petitions. By filing separate peti-

tions, all of which were identical except for the figures which were inserted in Section VIII, appellants have sought to avoid the pleading defects which were present in the complaint in the case of *Aetna Insurance Co.* v. *Hyde,* 275 U. S. 440, and at the same time to raise the issue of confiscation.

Appellants' attempt to inject the issue of confiscation into this case fails to surmount a difficulty much more fundamental than the deficiencies in the form of the pleadings with which this Court dealt in the *Aetna Insurance Co.* case. Even if the facts alleged by appellants were proved to be true, those facts, we submit, would not establish confiscation as a matter of law.[5] Appellants' allegations by which they endeavor to raise the issue of confiscation are all predicated upon their assumed right to earn what they call their "total calculable costs." This contention, it has already been shown, is fundamentally inconsistent with the ex-

[5] Appellants state that "it can fairly be taken as admitted that the rates are ruinous and confiscatory as to each and every appellant individually" (appellants' brief, p. 51). The only basis asserted by appellants for this curious conclusion is certain statements made in the joint answer filed by appellees denying the materiality of appellants' allegations with respect to the inadequacy of the prescribed rates as applied to the costs claimed by appellants to have been actually incurred. The extent to which appellants were compelled to distort the plain meaning of words in order to reach this conclusion is fully demonstrated by the excerpts from appellees' answer which are quoted on pages 50–51 of appellants' brief.

istence of power in a government agency to fix reasonable rates for the conduct of a business of the kind here involved.

Appellees, however, do not emphasize the insufficiency of the petitions, because they submit that the question involved in this case is not and cannot be an issue of confiscation at all. It is believed that the concept of confiscation is inherently inapplicable to a case of this character.

Appellants have not based their claims that the prescribed rates are confiscatory upon any alleged failure of the rates to yield an adequate return on the relatively small amount of capital that is employed in the public service.[6] A confiscatory rate, however, as generally understood in a public utility rate case, means a rate which if made effective will not produce a fair return upon the fair value of the property employed in the public service. The test of confiscation is a fairly simple one: Will the

[6]Appellants do not argue in their brief that the Secretary's allowance for interest on capital is inadequate. The District Court found that such allowance was adequate (R. 152). Appellants say (at p. 15 of their brief) that their business is "a personal service business," and further that "The physical facilities employed are provided by the Kansas City Stock Yards Company whose charges are not in question in the present proceeding." Thus, appellants do not even make any reference to the relatively small amount of their own capital that they utilize. Such capital consists of such tangible property as office furniture and fixtures, automobiles, horses, and some working capital (although the working capital needs are small, as the business is essentially a cash one) (R. 60–61).

prescribed rates yield upon the fair value of the property a fair return? Once the valuation of the property is determined and a fair percentage rate of return fixed, the application of the formula is more or less a mechanical process. If the revenue that will be yielded by the prescribed rates during a fair test period does not fall below the lower limits of a fair return upon the fair value of the property, the rate is not confiscatory. If the revenue yield during a fair test period is materially below those limits, the prescribed rates are considered to be confiscatory. Such a test obviously cannot be applied in the present type of case involving a business in which practically nothing save personal service is sold.

The usual criteria of confiscation palpably fail when attempts are made to apply them to rates for the sale of personal service. Appellants have not shown that such criteria are applicable, nor have appellants suggested any other criteria of confiscation capable of rational application. Throughout appellants' argument on confiscation there recurs frequently the suggestion that the prescribed rates must be confiscatory, because on the basis of past actual costs the profits of any particular firm would not be large (although, according to appellants' own computation, at page 56 of their brief, two of the appellant firms would have derived in 1931 a compensation per owner in excess of $4,000 and six of them would have derived

a compensation per owner of between $2,000 and $3,000 without making any cost reductions whatsoever), and many of the firms would earn no profits and would sustain deficits. Throughout their argument on the subject of confiscation (appellants' brief, pp. 48–80) appellants emphasize the supposed severity of the prescribed rates as applied to their businesses, severally and collectively, on the basis of inclusion of their past actual costs. But nowhere in appellants' argument is there suggested any concrete or practicable test of confiscation. Inasmuch as appellants contend that the rates prescribed are confiscatory as to all of the market agencies, even though as applied to the business of 1931 those rates would have produced a net return for the owners of many of the market agencies, it must be assumed that appellants believe that if rates are to avoid being confiscatory it is not enough for them to produce a profit, but that they must also produce a profit of some indeterminate and unspecified size. They do not anywhere suggest either the amount of, nor any method for determining the amount of, the profit which they assert the Constitution guarantees to each of them. This omission is doubtless intentional and prompted by considerations of caution because any attempt to give definite form or content to this asserted principle of a profit guaranteed by the Constitution would involve appellants' entire argument in disaster. The fact of the matter is that

the concept of confiscation cannot be adapted to the use to which appellants seek to put it.

Appellants' whole complaint is that the prescribed rates must be confiscatory because appellants think them to be "ruinous," and the argument that they are "ruinous" is based upon appellants' application of the prescribed rates to their business on the basis of inclusion of past actual costs. And even making the application of the rates on such a basis, it is shown by their table at page 56 that the rates would have been more than adequate to cover the actual costs in 1931 of more than half the firms.

Appellants have not stated just what it is that they think the prescribed rates would confiscate and the nearest that they come to the question is when they state that "the status of these appellants to raise the issue of confiscation and to have a determination upon it is not defeated by the personal service character of their business or by the fact that the pecuniary capital investment is small" (appellants' brief, p. 76). In support of this proposition, they cite *Truax* v. *Raich*, 239 U. S. 33, 37–38, and *International News Service v. Associated Press*, 248 U. S. 215, 236–237.[7] But these two cases obviously are not in point.

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[7] Appellants assert that this Court assumed in *Tagg Bros. & Moorhead* v. *United States*, 280 U. S. 420, that appellants have an undoubted status to raise the issue of confiscation (appellants' brief, p. 76). Appellees submit that appellants have misunderstood the action of this Court in that case.

Truax v. *Raich*, 239 U. S. 33, involved the constitutionality under the Fourteenth Amendment of an Arizona statute which provided that any employer of more than five workers must employ not less than 80 percent qualified electors or native born citizens of the United States, and provided criminal penalties for violation. An employee, upon receiving notice that he would be discharged on account of the provisions of the statute, brought a bill in equity against his employer and certain state officials, alleging that there was no adequate remedy at law and seeking a decree declaring the Act unconstitutional and restraining action thereunder. In sustaining the employee's right to maintain the suit, this Court held that the right to earn a livelihood and to continue in employment unmolested by efforts to enforce void enactments

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The question of whether the concept of confiscation could be applied in a case involving the fixing of rates for personal service was not argued in the briefs submitted in *Tagg Bros. & Moorhead* v. *United States*. This Court disposed of that case by holding that the action of the lower court in concluding that the rates fixed were not *unreasonably low* or confiscatory conformed to the evidence "whether the examination be confined to that evidence which was received by the Secretary or be extended to include the additional evidence introduced before the master and the court" on the issue of confiscation. It is significant that this Court found it unnecessary to decide whether additional evidence was admissible in the District Court on the issue of confiscation. It is submitted that this Court made no assumption with respect to the question of whether the issue of confiscation could be involved in that case, but held merely that *if* the claim of confiscation could be raised, there was no evidence to support it.

is entitled to protection in equity in the absence of an adequate remedy at law. The *Truax* case in no wise tends to establish that all persons who are now engaged in a business in which the sale of their personal service is subject to rate regulation are entitled under the Constitution to rates high enough to cover their actual costs and a profit, or that rates that fail to do this are confiscatory.

The case of *International News Service* v. *Associated Press,* 248 U. S. 215, is likewise inapplicable. It holds that a news gathering agency is entitled to protection in a court of equity against unfair competition by a rival agency, and that the right to acquire property by honest labor or the conduct of a lawful business is as much entitled to protection by a court of equity as the right to guard property already acquired. But this general proposition in no way tends to prove that the concept of confiscation is applicable to a personal service rate case. Granted that equity will protect from unlawful interference the right to acquire property by honest labor or to conduct a lawful business, it does not follow that appellants have a constitutional right to have their actual costs covered by the prescribed rates, or that rates failing to do this are confiscatory. There was no constitutional question involved in the *International News Service* case, the question there being primarily one of equity jurisdiction. In the instant case appellants are seeking to assert consti-

tutional rights, and the *International News Service* case furnishes no support for the supposed existence of the rights which appellants claim.

Appellants quote (appellants' brief, p. 76) from an old English case to the effect that "Every man's trade maintains his life, and therefore he ought not to be deprived or dispossessed of it any more than of his life," which, as a general proposition, of course, cannot be disputed.[8] But the right of

[8] The quotation is taken from the report of the *Case of Monopolies* found in Volume 11 of Coke's Reports, at page 84b (77 English Reprints, 1260). This was a case decided in 1603, in which the Court of Kings' Bench held invalid a monopoly of the manufacture of playing cards granted to a groom of the Privy Chamber by Queen Elizabeth. The monopoly had been granted in the exercise of the royal prerogative and had never been sanctioned by Parliament. The language quoted by appellants was used, whether by court or counsel is not clear, in pointing out that this exercise of the royal prerogative absolutely closed a trade to those who had previously followed it. The language may be of interest to the legal historian, but it throws no light on the question of whether a rate fixed for the personal service performed by appellants at the Kansas City stockyards can ever be confiscatory. In passing it may be noted, however, that whatever right a man may have had in England in the sixteenth century to engage in a certain trade or calling, he did not have an absolute right to any specified profit or to charge rates or prices which would cover his actual costs. The power to fix prices and rates for various trades and callings was exercised by the English Parliament throughout English history. For example, see 51 Henry III, 1266 (fixing the price of bread and ale); 23 Edward III, Chapter 6, 1349 (fixing the rate of wages of laborers); 5 Richard II, Stat. 1, Chapter 4, 1381 (fixing the price of wine); 24 Henry VIII, Chapter 3, 1532 (fixing maximum prices for beef, pork, mutton, and veal).

a person to engage in a business at a profit irrespective of his capacity to attract business, the economic demand for his enterprise, or his own economy and efficiency is not guaranteed by the Constitution. Appellants, in the very portion of their argument wherein they seek to establish that the prescribed rates are confiscatory, refer in passing to the fact that some businesses are destroyed "as the normal result of competition" (appellants' brief, p. 76). In a business such as appellant's, price or rate competition has been eliminated by their own action; therefore, they have protected themselves against one of the most usual causes of the destruction of a business—i. e., price competition. But the absence of this type of competition on account of the action of appellants themselves does not vest in them any constitutional right to rates which will maintain any given number of them in business irrespective of the amount of business they can get or the economy of their operation.

The Constitution does not protect against competition.[9] Appellants have cited no authority that

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[9] In *Aetna Insurance Co.* v. *Hyde*, 275 U. S. 440, this Court said (p. 447):

> The Fourteenth Amendment does not protect against competition.

In *Public Service Commission of Montana* v. *Great Northern Utilities Co.*, 289 U. S. 130, this Court said (p. 135):

> The due process clause of the Fourteenth Amendment safeguards against the taking of private prop-

establishes a constitutional right to rates which will maintain all or any of them in business at a profit over and above their actual costs as incurred. Manifestly, if this were the law, the market agency business could quickly become a certain haven of refuge for the unemployed.

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erty, or the compelling of its use, for the service of the public without just compensation. * * * But it does not assure to public utilities the right under all circumstances to have a return upon the value of the property so used. The loss of, or the failure to obtain, patronage, due to competition, does not justify the imposition of charges that are exorbitant and unjust to the public. The clause of the Constitution here invoked does not protect public utilities against such business hazards.

In *Hegèman Farms Corp.* v. *Baldwin*, 293 U. S. 163, this Court said (pp. 170–171):

> The appellant would have us say that minimum prices must be changed whenever a particular dealer can show that the effect of the schedule in its application to himself is to deprive him of a profit. This is not enough to subject administrative rulings to revision by the courts. If the designation of a minimum price is within the scope of the police power, expenses or losses made necessary thereby must be borne as an incident, unless the order goes so far beyond the needs of the occasion as to be turned into an act of tyranny. Nothing of the kind is charged. The Fourteenth Amendment does not protect a business against the hazards of competition. *Public Service Comm'n* v. *Great Northern Utilities Co.*, *supra*, at page 135. It is from hazards of that order, and not from restraints of law capriciously imposed, that the appellant seeks relief. The refuge from its ills is not in constitutional immunities.

It should be noted that in the usual public utility rate case the employment of fixed capital is large and the property is generally permanent and immovable. The very requirement of substantial investment in order to embark on a public utility enterprise tends to operate as a natural check upon overdevelopment and excessive competition between public utilities in the same community. It is fair and reasonable that if one's capital is employed in the public service under conditions where it cannot readily be withdrawn, the owner or owners should not be required to render public service at less than a fair return on the fair value of such property. Under the conditions of appellants' business, on the other hand, since no substantial capital is required, persons may enter and withdraw from business almost at random. While the more successful and efficient operators may spend a lifetime in the business, there is nevertheless no check upon the entry of new competitors. It is easy to foresee the endless chain of rate increases which the addition of new competitors might entail if it were held that they have constitutional rights to earn a profit over their actual costs regardless of the economic need for their services.

If confiscation is involved in this case, such questions as the following are presented: As a matter of law, must the rates be high enough to assure to all firms a profit over and above their

actual costs? If the rates need not be so high as to assure to all firms a profit over and above their actual costs, how many firms, or what percentage of the firms, are entitled to make a profit over and above their actual costs? If under a schedule of rates some firms can make a profit on the basis of their past actual costs and some firms cannot, are the rates confiscatory as to those firms which cannot make a profit and non-confiscatory as to those firms which can? If the rates are confiscatory as to some of the firms that sustain a loss on the basis of their past actual costs but not as to all of such firms, how much of a loss must be shown in order to render the rates confiscatory? What percentage of those firms sustaining a loss are suffering an invasion of constitutional rights? As to those firms that may make some profit under prescribed rates, are such rates non-confiscatory as to all of them or only as to those making a large profit? How much of a profit is required in order to render the rates non-confiscatory? Taking the firms shown by the table on page 56 of appellants' brief, are the prescribed rates confiscatory as to those firms showing a net owner compensation, and particularly as to the several firms showing the largest net owner compensation? If the rates are confiscatory as to all of the firms showing a net owner compensation, how much more compensation would they have to have available for owners in order to render the prescribed rates non-confis-

catory as to them? These and a multitude of other perplexing questions, none of which can be resolved by recourse to the usual tests of confiscation, would be injected into litigation of this type if the Court were to hold that a question of confiscation is presented.

Appellees contend that the fundamental question is not one of confiscation at all and that all of appellants' argument on the question of confiscation is based upon a false premise; *i. e.*, that the lawfulness of these rates can be tested by applying them to their actual costs for a given period irrespective of the reasonableness of those costs.

It is submitted that since there is in the instant case no issue of confiscation presented, the District Court erred in receiving additional evidence, and that appellees' objection (R. 181) that the testimony offered was not admissible because not properly related to the issue of confiscation should have been sustained. The testimony which was offered before the District Court is before this Court (R. 181–196) and the exhibits offered by appellants at that hearing have been printed and bound as a separate volume of the printed record on this appeal. In view of the foregoing, however, it is submitted that the testimony and the exhibits do not as a matter of law relate to any issue of confiscation, nor have they any evidentiary value in this case.

Moreover, since there is no issue of confiscation involved in this case, it results that the findings of the Secretary "must be accepted by the court as

conclusive, if the evidence before him was legally sufficient to sustain them and there was no irregularity in the proceedings" (*Tagg Bros. & Moorhead* v. *United States,* 280 U. S. 420, 444). The Secretary in exercising the rate-making power conferred by the Packers and Stockyards Act, is "a tribunal appointed by law and informed by experience" *Illinois Central R. R. Co.* v. *Interstate Commerce Commission,* 206 U. S. 441, 454. The same principle of judicial review, therefore, applies in this case as was stated by this Court with respect to review of orders of the Interstate Commerce Commission in *Interstate Commerce Commission* v. *Union Pacific R. R. Co.,* 222 U. S. 541, at pp. 547–548:

> Its conclusion of course is subject to review, but when supported by evidence is accepted as final; not that its decision, involving as it does so many and such vast public interests, can be supported by a mere scintilla of proof—but the courts will not examine the facts further than to determine whether there was substantial evidence to sustain the order.

This same view was reiterated in *Virginian Ry.* v. *United States,* 272 U. S. 658, when this Court said (p. 663):

> To consider the weight of the evidence before the Commission, the soundness of the reasoning by which its conclusions were reached, or whether the findings are consist-

ent with those made by it in other cases, is beyond our province.

In view of the foregoing, it is submitted that there is no issue of confiscation in this case, and that therefore the scope of judicial review defined in the above decisions applies.

III

There Is No Merit to Appellants' Contention That the Prescribed Rates Are "Ruinous" in Their Effect Upon Appellants' Businesses

Appellants' point I (appellants' brief, pp. 48–80) is devoted to the contention that the "ruinous effect of the rates upon the business of the appellants, severally and collectively, demonstrates that the order is arbitrary or confiscatory or both and should be set aside irrespective of the propriety of allowances for particular components of the rate."

The fundamental fallacy of appellants' whole argument in this respect has been demonstrated in points I and II of this brief, *supra*, pp. 14–48. This fallacy stated generally consists of (a) endeavoring to test the rates by applying them to appellants' past actual costs irrespective of the reasonableness of those costs, (b) in assuming that a showing that past actual costs will not be covered in some instances is a showing of confiscation, and (c) in assuming that there is or can be any question of confiscation in this case at all. The argument already made in points I and II of this brief demonstrates the inapplicability of the tests which appellants endeavor to apply in their point I.

Notwithstanding the irrelevance of most of the matters argued by appellants in their point I, and in the section of their brief entitled "Effect of the Rates Prescribed" (pp. 37–41), certain of the arguments made therein are so misleading as to require answer.

In the first place appellants contend (appellants' brief, pp. 51–52) that the majority of the court below held that the prescribed rates are confiscatory. This contention is apparently based upon certain statements contained, not in the opinion of the court on the merits, but in the opinion of Circuit Judge Van Valkenburgh denying a petition for rehearing. Appellants' contention in this respect is wholly without merit. The facts are that at the conclusion of the trial of this case the District Court rendered an opinion and entered findings of fact and conclusions of law to the effect that the findings of the Secretary were supported not only by substantial evidence but that if the petitioners were entitled to the independent judgment of the court upon the evidence, the findings of the Secretary were in the independent judgment of the court also supported by the weight of the evidence (R. 152). In its findings of fact the court stated that "upon an independent consideration of the evidence, including the additional evidence taken by the court," it adopted as its findings the findings of fact made by the Secretary. Judge Van Valkenburgh filed a

separate concurring opinion, in which he held that although the findings were supported by substantial evidence and that, therefore, the Secretary's order should be sustained, he was not convinced that all of the findings were supported by the weight of the evidence (R. 154–157). Thereafter, the appellants filed a petition for rehearing (R. 159–162). That petition was denied (R. 166). In denying this petition, Judge Van Valkenburgh filed a memorandum opinion, which was concurred in by Judge Reeves, in which Judge Van Valkenburgh reiterated his opinion that some of the findings of the Secretary, although supported by substantial evidence, were not supported by the weight of the evidence (R. 164–166). The petition for rehearing (R. 159–161) was based solely on alleged errors of law, and did not request a review of the evidence. Disposal of the petition did not require consideration of the evidence, nor was any additional evidence presented by appellants in support of the petition. Appellees submit, therefore, that despite Judge Reeves' concurrence in the memorandum opinion filed by Judge Van Valkenburgh in denying the petition for rehearing, it must be taken to be the fact that a majority of the court below found that the Secretary's findings were supported not only by substantial evidence but also by the weight of the evidence. Certainly that memorandum opinion did not purport to modify in any way the court's finding that upon an

independent consideration of all the evidence, including the evidence taken by the court, it adopted the Secretary's findings of fact as its own.[10]

Appellants further contend that the evidence in the record as to the "ruinous and confiscatory effect" of the prescribed rates "has been confirmed by the event," and in support of this contention they state that 9 of the 50 appellants have retired from business since the institution of this suit, and that one firm no longer continues business

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[10] It is of interest to note that, in addition to the instant case, three specially constituted three-judge District Courts have passed upon the validity of market agency rate orders of the Secretary, all of which orders were based upon the application of the same principles of rate making as the order in the present case. In none of these cases has there been any judge who thought that the enforcement of the orders should be enjoined. In *Tagg Bros. & Moorhead* v. *United States*, 29 F. (2d) 750, a master had ruled that the order there involved covering market agency rates at the Omaha stockyards was void, but a specially constituted three-judge District Court, consisting of Circuit Judge Lewis and District Judges Woodrough and Scott, upheld the order. In *C. H. Acker* v. *United States*, 12 F. Supp. 776, a specially constituted three-judge District Court consisting of Circuit Judge Alschuler and District Judges Wilkerson and Barnes upheld an order covering market agency rates at the Chicago stockyards, although District Judge Wilkerson thought that the order was not in all respects supported by the weight of the evidence. In *American Commission Co.* v. *United States*, 11 F. Supp. 965, a specially constituted three-judge District Court consisting of Circuit Judges Phillips and McDermott and District Judge Symes upheld an order of the Secretary covering market agency rates at the Denver stockyards, holding that the prescribed rates were supported by substantial evidence.

in the usual manner. They contend that as to each of these firms the Secretary's rates either failed to equal costs actually incurred or afforded wholly inadequate compensation to the owner (appellants' brief, p. 61). Appellants have filed certain affidavits in this Court to support their contention that the firms that have retired from business during the pendency of this proceeding would not have had to retire had it not been for the effect on their businesses of the impounding order.[11]

With respect to the propriety of filing these affidavits appellants have cited certain cases (appellants' brief, p. 14) to support their position that the filing of these affidavits is proper. The cases which appellants cite relate to the propriety of filing affidavits on the matter of whether or not pending litigation has become moot. The Government, however, in this case makes no contention that the case has become moot as to those firms which have retired from business but which have made deposits with the Clerk of the District Court pursuant to the impounding order. The Government has no objection to these affidavits as an appropriate means of establishing that the firms filing them still have an interest in this litigation. The Gov-

[11] These firms are listed at page 62 of appellants' brief. This table is prepared in the same manner as a table appearing on page 56 of their brief and of course the amounts shown in the column entitled "Net allowance to firms available for owners' compensation" are computed on the basis of actual costs in 1931 and not the reasonable costs.

ernment does object, however, to the use of such affidavits as a means to support appellants' argument that the "ruinous" effect of the rates has been confirmed by the evidence. The Government submits that whether or not the firms in question retired because of the effect of the Secretary's order is not a question which can be decided by this Court upon the basis of the affidavits submitted, and that the attempt to support appellants' argument on the alleged confiscatory effect of the prescribed rates by such affidavits is improper.

But it is submitted that there is nothing significant about the number of retirements from business during the period since the impounding order became effective. There is normally a substantial turnover among the firms doing business at the Kansas City stockyards. From the time that the Packers and Stockyards Act went into effect until the first hearing before the Secretary in this proceeding—a period of great prosperity—166 firms retired from business (Resp. Ex. 61). The findings in this case show that between the first and second hearings before the Secretary—a period of less than two years and before impounding commenced—18 firms retired from business (R. 31, 33). Appellants now seem to contend that there is something extraordinary that reflects upon the reasonableness of the Secretary's order because 10 firms have retired from business since the impounding order went into effect on July 22, 1933. Obviously,

the retirements from business since the impounding order was entered have been no greater than the normal retirements for a similar period of time in the market agency business as carried on at Kansas City; and, indeed, the number of retirements since the impounding order has been in effect has been only a little more than half as great as the number occurring during the period between the two hearings although the period between the two hearings was less than two years, while the impounding order has already been in effect over two and one-half years.

Appellants further argue that the yield of the rates as shown by the evidence in this case is in decided contrast to the yield of the rates as shown in the *Tagg Bros. & Moorhead* case (appellants' brief, pp. 64–69). In support of this contention, appellants have reproduced a schedule from the record in the *Tagg Bros. & Moorhead* case showing the income that would have been received per owner at the Omaha stockyards if the rates prescribed for that market had been in effect in 1925. They compare this showing with the table at page 56 of their brief setting forth the compensation per owner that would have been available in 1931 at the Kansas City stockyards under the rates challenged herein.

A comparison of the conditions at the Omaha stockyards during the test year employed in the *Tagg Bros. & Moorhead* case with the conditions at the Kansas City stockyards during the test year

employed in the present case shows a notable difference in favor of the Omaha stockyards as to the volume of animals handled, although the number of salesmen and market agencies at the two stockyards during the respective test years was approximately the same. This is an indication that the Kansas City stockyards in 1931 was obviously over-manned in comparison with the Omaha stockyards in 1925. Under such circumstances, it is natural and proper that a reasonable schedule of rates would yield a much higher net owner return for the market agencies at the stockyards having the larger volume.[12]

IV

The Rates Prescribed by the Secretary Were Determined by a Lawful Method

Section 305 of the Packers and Stockyards Act provides that all rates or charges made for stockyards services furnished by market agencies shall be just, reasonable, and non-discriminatory. Un-

[12] A comparison of the volume of livestock handled at Omaha in 1925 with that handled at Kansas City in 1931 follows:

Comparison Volume—Omaha, 1925; Kansas City—1931—Tagg Bros. & Moorhead Record 828–829—Kansas City (Less Cooperatives), Gov. Ex. 115

Selling	Omaha—1925	Kansas City—1931
	Cars	*Cars*
Cattle and calves	64,832	57,264
Hogs	45,984	13,099
Sheep	9,145	8,021
Total	119,961	78,384

der Section 310 of the Act the Secretary of Agriculture is charged with the duty of investigating the reasonableness of rates and charges made by market agencies and is authorized to determine and prescribe just and reasonable rates and charges. In the exercise of this duty, the Secretary initiated the instant proceedings to determine the reasonableness of the rates and charges collected by the market agencies operating at the Kansas City stockyards and, after two hearings, he entered the order prescribing the maximum rates which are now attacked by appellants.[13]

In paragraph 114 of his findings the Secretary stated the principles of rate-making which he applied:

> The Packers and Stockyards Acts provides that if, after investigation, the Secretary of Agriculture finds commission rates in effect at a livestock market to be unjust, unreasonable, or discriminatory, he shall prescribe rates that are just, reasonable and non-discriminatory, or the maximum or minimum rates, or the maximum and minimum rates, which are just, reasonable and non-discriminatory. In arriving at such a schedule it is necessary to adopt a guide

[13] The voluminous record in this case indicates the care and thoroughness with which the investigation of the conditions under which appellants conduct their businesses at the Kansas City stockyards was carried out. The two hearings lasted in the aggregate more than three and one-half months, and all matters which might possibly affect the problem were developed in the evidence.

> to reasonableness. The guide adopted in this case is that under ordinary conditions as they prevail on the Kansas City market, a schedule of rates should be high enough to produce sufficient gross revenues to pay all reasonable costs and a reasonable compensation for management and risk, that is, a reasonable profit, to the owner or owners of any firm which receives enough livestock to enable it to handle its business in a reasonably efficient and economic manner. This principle was followed in the Omaha Commission Rate Case, and was approved by the Supreme Court of the United States in the case of *Tagg Bros. and Moorhead et al.* v. *United States* (280 U. S. 420). It becomes necessary, therefore, in following this guide to determine the reasonable costs to the respondents of handling each species of livestock. [R. 83.]

It is appropriate that brief discussion be given to the specific steps which the Secretary followed in applying the above principles and in arriving at a determination of maximum reasonable rates. The process of investigation began by having individual audits made covering the business of each firm for the year 1929 (Gov. Ex. No. 14). In preparation for the rehearing similar audits were made for the year 1931 (Gov. Ex. 114). These audits were accepted by the appellants as constituting true reflections of the facts disclosed by their books and records of account for the periods covered. (R. 86–87, 988, 1017–1018.) They were used as the

basis of all computations made by both the accountant for the Government and the accountant for appellants. Both the accountant for the Government and the accountant for appellants, in making their respective analyses of the business, established classifications of expenses to which they assigned the specific cost items. The classification adopted by the Government accountant and that adopted by appellants' accountant are quite similar and are set out in the Secretary's findings (Par. 123, R 87–88). The Secretary, however, upon consideration of the case as a whole, prepared a classification of costs and other rate elements which did not quite conform to either of the classifications prepared by the accountants (R. 122), but which included all of the substantial items of cost considered by the accountants. Using such classification, he prepared functional cost tables setting forth the actual costs of each market agency by functions for the year 1931. He also classified costs into two groups, namely, (1) costs which the conditions of the business tend to keep down, and (2) costs which the conditions of the business tend to increase (R. 91), as follows:

A. Costs which the conditions of the business tend to keep down:

1. Yarding salaries.
2. Yarding expenses.
3. Office salaries.
4. Office expenses.
5. Administrative and general.

6. Insurance.
7. Interest on investment.

B. Costs which the conditions of the business tend to increase:

1. Salesmanship costs.
2. Business getting and maintaining costs.

This classification is based upon the fact that any agency of ordinary efficiency will, as a matter of common business sense, use its best efforts to avoid paying out any more money than is necessary on account of the items of cost designated by the Secretary as costs which the conditions of the business tend to keep down and this attitude is not affected by any unusual condition existing at the Kansas City market. On the other hand, it is found by the Secretary (R. 109), and is undisputed by appellants, that competition among the market agencies at Kansas City for the volume of business offered to the market as a whole is extraordinarily intense. All of the agencies in fact charge uniform rates for the services rendered by them (R. 216, 753, 708), and each agency endeavors to attract business away from the other agencies by the various means hereafter described under the portions of this brief devoted to salesmanship costs and business getting and maintaining costs. Since the volume of business coming to the market as a whole is not increasing—it appears to be gradually decreasing (R. 516, 765, Gov. Ex. 32)—competitive costs have tended to increase as the competitive struggle has become intensified.

In the class of costs which conditions of the business tend to keep down, the Secretary, having prepared functional cost tables, proceeded to determine from them a normal or reasonable functional unit cost for each function.[14] The functional cost tables are set forth in paragraphs 144–158 of the Secretary's findings (R. 98–104, 110–115, 118–120). As to this class of costs, the Secretary's allowance for each function was higher than the actual cost incurred for that function by a substantial number of firms. For many of these functions the Secretary's finding of reasonable costs exceeds the average actual unit costs of all the firms.[15]

The following table is a comparison of the unit costs found by the Secretary to be reasonable for each function distributed to each species, and the weighted average actual unit costs of all of the firms for each of the functions as to which the conditions of the business tend to hold the costs down:

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[14] The allowance for insurance, which is a relatively minor item, was determined by using actual quotations of insurance premiums applicable to the market as a whole and reducing the resulting figures to a per head basis (R. 115–117). This method was followed, rather than basing the allowance upon actual expenditures for premiums, because some of the firms did not carry insurance but instead carried their own risks.

[15] The Secretary's findings as to reasonable unit costs are found on page 122 of the record. The average unit costs actually incurred are computed from figures contained in Government Exhibits 115 and 115B.

	Cattle and calves		Hogs		Sheep	
	Reasonable	Average	Reasonable	Average	Reasonable	Average
	Cents	*Cents*	*Cents*	*Cents*	*Cents*	*Cents*
Yarding salaries	7.50	7.04	3.00	3.69	0.80	0.57
Office salaries	5.25	4.80	3.00	2.78	1.00	.81
Yarding expenses	1.40	1.10	.60	.03	.04	.004
Office expenses	3.00	3.09	1.75	1.82	.50	.49
Administrative and general expenses	3.30	3.33	2.00	1.89	.50	.53
Insurance	.70	1.39	.25	.53	.13	.27
Interest	1.50	.84	.70	.30	.40	.13
Total	22.65	21.59	11.30	11.04	3.37	2.804

In determining the allowances for the other class of costs—i. e., those which the conditions of business tend to increase, and which consist chiefly of salesmanship and business getting and maintaining—the Secretary used different methods from those just described.

The Secretary determined the reasonable unit costs of salesmanship by relating a reasonable annual salary for a salesman to a reasonable year's performance expressed in terms of the number of head of livestock sold (Par. 134–143, R. 92–97). The method used for determining reasonable salesmanship costs is the same as that which was employed by the Secretary in prescribing rates applicable to the market agencies doing business at the Omaha stockyards. That method was summarized in the opinion of the District Court in *Tagg Bros. & Moorhead* v. *United States,* 29 F. (2d) 750, as follows (pp. 754–755):

> The plaintiffs say that the per car limit for selling is so low that it is not compensa-

tory, that it is below actual cost, that it is confiscatory, and that it will cause many of them to do business at a loss, and so be driven out of business. There is no uncertainty about how the Secretary came to use the per car limit for selling as a cost item in service in arriving at the rates in his schedule. It was shown to the Secretary that some of the men who do this selling on the market sell a great many cattle, and some sell very few. Some are working for high wages, and some for much lower, and others again, as owners of the business, charge all there is left in the business, after paying expenses, to this selling job performed by themselves.

The Secretary was not concerned with nor attempting to say just what a cattle salesman should be paid. It was his task to find a maximum per car for this work, beyond which anything charged would be unreasonable. To that end he considered how many cars a man could sell in a day, if he had the cars to sell, and also how many cars the men engaged actually do sell in the course of the business. From the whole the Secretary concluded that good cattle and sheep salesmen were being paid salaries of $5,000, and hog salesmen $4,000, and that any good cattle and sheep salesman can readily sell 1,000 cars of cattle or sheep in a year, if he has that many to sell, any good hog salesman could easily sell 1,333 cars of hogs in a year. There was in fact uncon-

tradicted proof that each could sell many more cars. If he sells more cars per year, as some salesmen do, the Secretary has done nothing to prevent more than $5,000 being paid to the salesman, either as a wage or as a charge against the business, if the salesman is the owner.

The only difference in the type of salesmanship findings made in the order attacked in the *Tagg Bros. & Moorhead* case and those in the present case is that in the order involved in the *Tagg Bros. & Moorhead* case they were found on a per car basis, whereas in the order involved here they were found on a per head basis.

In determining the proper allowance for business getting and maintaining the Secretary took into consideration, in addition to the functional cost table (R. 104–109), the unusual competitive condition at the market, and upon the basis of all the facts in the record found a reasonable unit allowance to be covered into rates for business getting and maintaining (R. 109–110). This he did by taking cognizance of the fact that the cost of business getting should obviously be related to the amount of business obtained by taking a percentage of the total reasonable costs and profits—which represent the reasonable gross income of the business—that percentage being higher than the percentage actually spent for business getting and maintaining by many of the firms in business.

That the method employed by the Secretary for determining reasonable rates in the present case is a lawful method necessarily follows from the fact that it is the same method that was employed in the order involved in the *Tagg Bros. & Moorhead* case. The problem with which the Secretary is faced in determining reasonable rates was stated by the District Court in the *Tagg Bros. & Moorhead* v. *United States,* 29 F. (2d) 750, as follows (p. 753):

> Accordingly it falls to the Secretary, under the Packers and Stockyards Act, to consider what rate is high enough to compensate the efficient, low enough to restrain destructive scrambles for the business among too many agencies, and within the margin of the value of the service to the shippers, and on the whole case to fix reasonable rates, just to all; a most delicate function obviously, but, if necessary, possible.

The method used in that case by the Secretary was epitomized as follows (p. 753–754):

> To that end he must and does have the power to inquire into all of the details of the marketing agencies' business, as it has been and is carried on, and to fix a maximum price, reasonable and proper to be charged. It appears to us from the evidence that the Secretary, through the various steps leading up to his final order, has been guided by proper considerations. He accorded the parties in interest a hear-

> ing, and from oral evidence and extensive audits of each and all of the marketing agencies concerned the Secretary undoubtedly had data before him sufficient to build up a rate schedule. He had disclosed to him each and all of the details and items of expense that go to the performance of the function; he found a maximum reasonably chargeable for each detail, and, adding them together, he fixed a maximum charge for the whole service.

The fact that the results of the application of the method may in some respects have been different in this case from what they were in the *Tagg Bros. & Moorhead* case in no way detracts from the validity of the method. In *Tagg Bros. & Moorhead* v. *United States,* 280 U. S. 420, 442, this Court found that the evidence before the Secretary amply supported the findings and conclusions reached by him. Whether the evidence amply supports the findings in this case is a separate question which will be presently discussed, but it is a question quite apart from the validity of the method. As to the validity of the method, there can be not the slightest doubt after a comparison of the Secretary's findings and order in this case with those made at the Omaha stockyards and upheld in the *Tagg Bros. & Moorhead* case.

V

The Prescribed Maximum Rates Admittedly Would Have Yielded in 1931 More Than the Costs and Profits Found by the Secretary to be Reasonable

The prescribed maximum rates would have yielded in 1931 a substantial margin over and above the costs and profits found by the Secretary to be reasonable. Appellants have not individually or collectively attacked the adequacy of the prescribed rates to produce the costs and profits found by the Secretary to be reasonable, and indeed there would have been no possible ground for such an attack because the facts in this respect are not open to dispute.

By applying the Secretary's reasonable per head costs and profits to the total volume of the several species arriving at the Kansas City stockyards during 1931 (R. 122, Appellants' Ex. 4), the total reasonable costs and profits for all species for that year can readily be ascertained. Such an application results in the figures found in the first column in the table following. The figures in the second column indicate the revenues which would have been produced in 1931 per species by the prescribed maximum rates as shown by "Petitioners' Original Exhibit No. 4." The third column indicates the margin which the rates would have produced over and above the reasonable costs and profits.

	Revenues under rates	Reasonable costs and profits	Margin
Cattle and calves	$1,186,083.25	$1,115,168.88	$70,914.37
Hogs	270,966.23	233,421.76	37,544.47
Sheep	159,379.56	117,625.49	41,754.07
Total	1,616,429.04[1]	1,466,216.13	150,212.91

[1] This computation does not take into account additional revenue amounting to $48,430.27 which appellants are free to collect by applying the buying rates prescribed by the Secretary.

Thus, in addition to the separate allowance made in the rates for profit, the prescribed rates would have produced if they had been in effect in 1931, $150,212.91 in excess of the costs and profits found by the Secretary to be reasonable.

This liberal margin which the rates will yield over and above reasonable costs and profits supplies additional revenue which in normal course will be additional profit. It also furnishes a cushion to offset any possible error which may have crept into the calculations made in determining reasonable costs. This margin, moreover, furnishes a protection against possible temporary hardship which may occur from time to time through normal fluctuations in marketing conditions. The undisputed presence of this liberal margin over and above the costs and profits found by the Secretary to be reasonable considerably simplifies the case and narrows the issue in the final analysis to the reasonableness of the Secretary's cost findings and the sufficiency of the evidence upon which they rest.

VI

The Secretary's Findings With Respect to Reasonable Unit Costs and Profits Are Supported by Substantial Evidence

The adequacy of the Secretary's findings is to be tested solely by whether there is substantial evidence to support them—if there is, the findings should stand. It is immaterial whether some of the evidence was irrelevant or of little weight, or whether the Secretary's reasoning is in all respects persuasive, or whether no conclusions other than the ones adopted by the Secretary could conceivably be drawn from the evidence, or whether his findings are severe or generous as to particular items of cost. This is the rule as to the scope of review laid down by this Court in *Tagg Bros. & Moorhead* v. *United States,* 280 U. S. 420,[16] and no circumstance exists in this case which justifies the application of a different rule.

Much of appellants' argument on the evidence does not affect the essential validity of the Secretary's findings. Some of appellants' contentions are directed to alleged errors in the Secretary's reasoning, others to the effect of conflicting evidence, others to the relative weight which should be given to different kinds of evidence. For example, appellants insist that the Secretary gave too much importance to opinion evidence with re-

[16] See particularly the passage in the opinion at page 442.

spect to the number of animals that a salesman might reasonably be expected to sell and not enough weight to evidence as to the seasonal variations in the arrival of livestock. Appellees submit that these criticisms, considered on their merits, carry little weight, and that in any event they are of no importance and afford no basis for rejecting the Secretary's findings. The burden is on appellants to show that these findings were made arbitrarily and without substantial evidence to support them, and appellants have failed to sustain this burden.

At the conclusion of the trial of this case in the court below, as has been pointed out on pages 49–51, that court held not only that the findings of the Secretary were supported by substantial evidence, but also, that if the petitioners were entitled to the independent judgment of the court upon the evidence, those findings were in accordance with the weight of the evidence (R. 152); and the court "upon an independent consideration of the evidence, including the additional evidence taken by the court," adopted as its own findings the findings of fact made by the Secretary (R. 153).

Appellees will now consider the evidence which supports the Secretary's findings and the attacks made by appellants upon that evidence.

A. THE SECRETARY'S FINDINGS AS TO THE REASONABLE COSTS OF SALESMANSHIP ARE FULLY SUPPORTED BY THE EVIDENCE

The Secretary's findings as to the reasonable cost of salesmanship are found in paragraphs 142 and 143 of his order (R. 97) and are as follows:

> Giving due consideration to the conditions under which salesmanship is performed on the Kansas City market, the volume of livestock handled by the respective firms and the estimates of salesmen as to what constitutes a reasonable year's work, it would be reasonable to expect a good and experienced salesman to sell in a year from 27,000 to 32,000 head of animals of the bovine species as they arrive at the Kansas City stockyard in the year 1931; a hog salesman from 75,000 to 100,000 head of hogs in a year; and a sheep salesman from 240,000 to 275,000 head of sheep.
>
> If the selling of 29,000 head of cattle and calves, which is below the estimate of any witness as to what constitutes a reasonable year's work, be taken as the work to be done in order to earn a salary of $4,000, which is in the high salary range being paid salesmen on the Kansas City market, the reasonable cost to the shipper on account of the function of salesmanship is 13.79 cents per head. Likewise, if the selling of 85,000 head of hogs be considered a reasonable year's work, and $3,000, which is in the high salary range, be taken to be a corresponding remuneration, the salesmanship cost to the

shipper on account of hogs is approximately 3.529 cents per head. If the selling of 250,000 head of sheep be considered to be a year's work for which a $3,500 a year salary is compensatory, the reasonable per head cost to the shipper for salesmanship on account of sheep is 1.4 cents per head. On the basis of all the facts in the record it is found that the following constitute reasonable per head costs to be covered into rates on account of salesmanship:

Cattle and calves	$.1379
Hogs	.0353
Sheep	.0140

In making these findings, the Secretary took into consideration all of the functions and duties which a salesman ordinarily performs.[17]

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[17] The Secretary in paragraph 115 of his order (R. 84) states:

> * * * a salesmen cannot sell livestock except when the market is open and more or less active, notwithstanding the volume of livestock which he had for sale. On the other hand, the type of men who make good salesmen would hardly be content to accept less salaries in consideration of short hours. They demand and get good pay and are willing to return therefor a reasonable day's and week's service. Therefore, the fact, that prior to the selling hours they assist in the yards and that, during the last one or two days of the week they go to the country to appraise livestock and solicit business do not increase the respondents' expenses for salaries. Therefore, in the distribution of costs hereinafter made to functional accounts, the services of a salesman, for instance, are not divided as between selling, yarding, office work and business getting and maintaining, but are considered as being covered by the reasonable allowance for salesmanship.

Appellants have attempted to create the impression—which is contrary to fact—that the Secretary has limited the number of salesmen at the Kansas City market and fixed the salaries which are to be paid to these salesmen. This conclusion of appellants is based upon a misunderstanding of the Secretary's method of determining unit costs for salesmanship—a misunderstanding which attributes to the Secretary a method far more involved and complicated than the one actually employed. Appellants state (appellants' brief, p. 105–106):

> The Secretary has, therefore, divided the total number of each species sold by the hypothetical performance assumed, for the purpose of determining the number of salesmen required to conduct the business on such hypothesis, and then multiplied the assumed annual service value per salesman by the number of salesmen so determined. Having thus arrived at the total cost of salesmanship for each species, this figure is in turn divided by the total number of each species handled, whether bought or sold (although the evidence shows that the cost of selling exceeds the cost of buying),[18] and the quo-

[18]Appellants throughout their argument relative to the Secretary's estimate of salesmanship costs have inserted such confusing and misleading statements as to buying costs being lower than selling costs. Whether or not this is true as to the total cost of handling sales as compared with the total cost of handling purchases is open to question (see *infra*, p. 164). If it is true, appellants have admitted that the reason lies in lower yarding and business getting and maintaining costs as

tient adopted as the reasonable cost of selling per head for each of the several species.

In fact the Secretary used no such involved process in determining salesmanship costs. As shown by the plain words of his order (Par. 143, R. 97, quoted above), he determined the reasonable salary for an efficient salesman and then associated that salary with the selling performance which such a salesman might reasonably be expected to attain. He then divided that salary by the volume associated with it in order to obtain the reasonable per head cost of selling any particular species. To be specific, the Secretary associated the selling of 29,000 head of cattle and calves with a salary of $4,000 and determined that the per head allowance for salesmanship should be $0.1379 for that species. He associated the selling of 85,000 head of hogs with a salary of $3,000 and determined that the per head allowance for salesmanship

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to purchases (appellants' brief, pp. 59–60, fn. 2) rather than lower buying salaries. There is no contention that the Secretary was wrong in finding (par. 165, 168, R. 122–123) that, for the most part, the same personnel did the buying and the selling, and that a good buyer could buy as much livestock as a good salesman could sell.

In any event appellants state "* * * the appellants do not attack the maximum buying charges, but on the contrary take the position that they are, in fact, too high, being mere 'paper rates' which can not in practice be charged and are not being charged by the appellants" (appellants' brief, p. 5). The appellants are under no legal obligation to charge the maximum buying rates, and it seems clear that so far as those rates are concerned they have no ground for complaint.

should be $0.0353 for that species. For sheep he associated the selling of 250,000 head with a salary of $3,500 and determined that the per head allowance should be $0.014 for that species.[19] This method did not contemplate the limiting of the number of salesmen to be employed at the Kansas City market nor the fixing of the salaries which were to be paid to those salesmen.

The Secretary determined a reasonable salary figure and a reasonable performance figure, not because those figures considered by themselves had any interest for him, either for the purpose of limiting salaries or the number of salesmen, or for any other purpose, but because those figures were the only reasonable means of accomplishing the end which he had in view, that is, the computation of a reasonable cost for selling a unit of livestock. The fact that the Secretary associated a performance figure with the salary figure does not indicate that he expected every salesman in the market to equal that performance or to receive that particular salary. For example, approximately 86.5% of all the employed salesmen selling cattle and calves at the Kansas City market in 1931 received less than $4,000, the salary figure which the Secretary used in determining reasonable salesman-

[19] The mathematical calculations were as follows:
$4,000 ÷ 29,000 = 0.1379.
$3,000 ÷ 85,000 = 0.03529
$3,500 ÷ 250,000 = 0.014

ship costs.[20] The Secretary obviously did not contemplate that the salaries of 86% of the salesmen should be raised to $4,000, nor did he contemplate that those salesmen who received less than $4,000 should now or hereafter attain the performance figure which he used in determining reasonable costs. Appellants in various portions of their brief [21] have misinterpreted and misconstrued the Secretary's order as illustrated by their statement that "the number of cattle salesmen and of sheep salesmen would thus have to be cut in half and the number of swine salesmen would have to be quartered" (appellants' brief, p. 107), and by their repeated characterization of the figures as "Standards," as if the Secretary had decreed how many head of livestock a salesman is to sell and what salary he shall receive. The effect of such statements is to distort the Secretary's findings and order and to inject false issues into the case. The order in no way reduces the number of salesmen or fixes the salaries for salesmen.

Each firm is free to pay its salesmen whatever salary its business justifies.[22] A salesman may be

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[20] See p. 79, *infra*.

[21] For example see the footnote on pages 92 and 93 of appellants' brief, pages 106–107, and the footnote on page 106.

[22] This was clearly stated by the Secretary in his order (Par. 135, R. 94):

> It [the Secretary's method] finds a reasonable compensation to the respondents for the performance of a unit of salesmenship, whether it be done by owner

paid according to his individual ability, according to his value to the firm, or according to any other factors which his employers desire to consider. If a commission firm wishes to employ two men to do the job which one might reasonably be expected to do, it is free to do so. It is equally free to employ one man to do the job which two might reasonably be expected to do.

Examination of appellants' argument discloses that their principal objection is not to the action of the Secretary in computing unit costs by associating a salary figure with a performance figure, but rather to the particular performance figures which the Secretary selected for that association.

Appellants characterize these figures as "hypothetical" and as "unsupported by and in variance with actual experience" (appellants' brief, p. 108). Such characterizations do not discredit the evidence upon which the Secretary's findings rest. The absolute inadequacy of actual costs as a test of reasonableness has been explained above (pp. 20–32). As will be explained later in this brief

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or employee, and leaves the firm in position to expand or contract its reasonable income as it proves successful or unsuccessful in applying the unit of salesmanship performed. To illustrate, if a fair annual salary is taken as $4,000 and a reasonable full year's performance as the sale of 29,000 head of cattle, then the reasonable allowance for salesmanship will be 0.1379 cents per head and the owner who is able to sell 35,000 head will be entitled to a compensation of $4,826.50, while one who succeeds in selling only 20,000 head will be entitled to only $2,758.

(pp. 90–100), the Secretary had before him evidence as to abnormal conditions in the Kansas City stockyards which compelled him to reject the average cost of salesmanship to all market agencies, or the salesmanship costs of some "typical and representative" market agency (to use the appellants' own words, appellants' brief, p. 89) as a test of reasonableness.

To the extent that appellants use such epithets as "hypothetical" for the purpose of suggesting that no salesman in the Kansas City market has attained or can attain the performance figures selected by the Secretary, or that the salary figures which he used were unreasonably low, appellants either ignore or distort the facts. There is ample evidence in the record that the salary figures selected by the Secretary are reasonable and that salesmen operating in a reasonably efficient manner and under circumstances permitting such reasonable efficiency can sell the volume of livestock which the Secretary has associated with these salary figures.

1. The Evidence Fully Supports the Salary Figures Selected by the Secretary

For the purpose of determining the reasonable cost of selling a unit of livestock, the Secretary selected the following annual salary figures (R. 97):

Cattle and Calves	$4,000
Sheep	3,500
Hogs	3,000

Appellants make no serious attack on these salary figures[23] apart from the fact that they have been associated with performance figures which appellants claim are excessive.

The Secretary's selection of salary figures was based upon an examination of the salaries actually paid in the Kansas City market to those salesmen whose salaries are fixed in arm's length bargaining.[24] The following table shows the number of employed salesmen and buyers in 1929 and 1931

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[23] Here, as in *Acker* v. *United States, et al.*, No. 655, October Term, 1935, which has been submitted to this Court, the market agencies appointed a committee which appraised the value of the services of the owners. Appellees submit that these appraisals are not entitled to any consideration in the determination of reasonable costs. This question is not discussed herein because appellants in their brief have not relied upon these appraisals nor attempted to use them as the basis for an attack upon the salary figures selected by the Secretary.

[24] In selecting salary figures the Secretary discarded (a) the appraisals of the value of owners' services referred to in footnote 23 above, (b) the salaries which owners had set up for themselves on the books, and (c) profits received by the owners. Instead, he accepted as the test of salesmanship costs the salaries which the owners were compelled to pay to those salesmen they employed in arm's length bargaining. The reasonableness of the Secretary's action is obvious. The appraisals do not represent actual out-of-pocket expenses but were excessive, hypothetical figures selected by a committee appointed by market agencies. The amounts of the salaries which the owners had set up on their books for themselves were fixed entirely at the owners' discretion and bore no relation to the reasonable cost of salesmanship. The propriety of discarding profits as a test of salesmanship costs is hardly open to question.

for each species of livestock and the salary classifications into which they fall (Gov. Ex. 15, pp. 121–125; Gov. Ex. 115, p. 85):[25]

Salesmen and buyers

CATTLE SALESMEN AND BUYERS

	1929	1931
Number receiving—		
$6,000 or more	6	4
$5,000 to $6,000	3	5
$4,000 to $5,000	13	9
$3,000 to $4,000	38	32
$2,000 to $3,000	30	50
Less than $2,000	32	33
Total	122	133

HOG SALESMEN AND BUYERS

Number receiving—		
$5,000 or more	1	2
$4,000 to $5,000	2	1
$3,000 to $4,000	10	4
$2,000 to $3,000	16	20
Under $2,000	13	19
Total	42	46

SHEEP SALESMEN AND BUYERS

Number receiving—		
Over $5,000	1	1
$4,000 to $5,000	2	1
$3,000 to $4,000	4	2
$2,000 to $3,000	3	6
Under $2,000	1	4
Total	11	14

This table indicates that in 1931 86.5% of all the employed cattle and calf salesmen received less than $4,000, the salary figure used by the Secretary, and

[25] These figures, which include the salesman and buyers of the two cooperative firms, indicate that there were more employed salesmen for all species in 1931 than in 1929.

that 84.8% of the employed hog salesmen received less than $3,000, the salary figure selected by the Secretary. Government Exhibit 115, page 85, shows that in 1931 85.7% of the sheep salesmen received salaries not substantially greater than $3,500, the salary figure selected by the Secretary.[25a]

The average salary for employed cattle and calf salesmen in 1931 was $2,807, for hog salesmen $2,356, and for sheep salesmen $2,855. The median salary in 1931 for cattle and calf salesmen was $2,400, for hog salesmen $2,177, and for sheep salesmen $2,449. (Gov. Ex. 115, p. 85.)

2. *The Secretary's Selection of Figures as to Salesmanship Performance Is Fully Supported by the Evidence*

For the purpose of determining reasonable unit selling costs the Secretary associated with the salary figures, discussed above, the following figures as to annual salesmanship performance (R. 97):

	Head
Cattle and Calves	29,000
Sheep	250,000
Hogs	85,000

These figures are attacked by appellants as "hypothetical." Admittedly, the great majority of the salesmen in the Kansas City market did not in 1931 sell the volume of livestock represented by these figures. This fact should be considered, however, in the light of the conditions of overmanning and excessive competition which prevailed in the Kansas City stockyards and which inevitably re-

[25a] This percentage figure includes one salesman who receives $3,533.32. (Gov. Ex. 115, p. 85.)

duced salesmanship performance, among the more efficient as well as the less efficient salesmen, far below a reasonable figure.

Appellants' insistence that these performance figures are "hypothetical" and therefore must be rejected is, in reality, an attack upon the basic principle of the rate-making method which the Secretary has employed and not an attack upon the evidence which he had before him. Appellants insist that only one kind of evidence can properly support a finding by the Secretary as to salesmanship performance and that is evidence that a large number of salesmen actually attained the performance figures selected by the Secretary. This is merely another aspect of appellants' basic contention that the Secretary should prescribe rates which will cover the actual costs incurred by appellants and, as has been explained above, this contention is designed to defeat and nullify the rate-making power conferred upon the Secretary by the Packers and Stockyards Act; if the Secretary is chained to actual costs, the existence of unreasonable and extravagant costs will automatically make it impossible for the Secretary to prescribe reasonable rates.

The salary figures selected by the Secretary are "hypothetical" only in the sense that they are a determination of what a salesman can do if he operates in a reasonably efficient manner under circumstances permitting such reasonable efficiency. Any determination by the Secretary which does not merely adopt actual costs but in-

stead attempts to adjust and correct these costs so as to bring them into conformity with a standard of reasonableness, must be "hypothetical" in this sense. But on the other hand, the performance figures used by the Secretary are not "hypothetical" in the sense that they are completely imaginary and incapable of realization. In the case of each species there was substantial evidence before the Secretary which supported the findings.

The performance figures selected by the Secretary are approximately equivalent to 1,000 cars of cattle and calves and 1,000 cars of sheep and 1,133 cars of hogs. Mr. W. S. Angle, manager of the Producers Commission Association, a cooperative market agency at Kansas City, testified: [26]

> Q. Now, considering all those things and including all the classes of cattle, all the kinds, including the truck-ins as well as those that come by rail, and taking them as they do come, that is taking into considera-

[26] Appellants' claim that Mr. Angle was not qualified to testify as to salesmanship performance is obviously unfounded (appellants' brief, p. 121). This witness was manager of one of the four largest commission firms at the Kansas City market. He testified that he had been associated with the livestock industry practically all of his life (R. 333) and had specialized in agricultural work at Missouri University (R. 333–334). Certainly he was capable of judging the reasonable performance for a good salesman and his testimony clearly shows that he understood the matter as to which he was testifying and took into consideration all pertinent factors in giving his answers. A perusal of the subsequent cross-examination by appellants' counsel (R. 343–345) shows that counsel was unsuccessful in attempting to break down the force of the witness' testimony. When the witness

tion that there are peak periods in the year that you cannot get them evenly distributed throughout the year and that you cannot get them evenly distributed throughout the week, considering all these things and the conditions as they exist right now, I do not mean just as confining your considerations to this past week, but considering present conditions of an annual basis at Kansas City, and expressing it in terms of carloads, would you say that if a good cattle salesman had that many cattle to sell he could dispose of 1,500 carloads in a year and do it as it should be done?

A. Yes, sir.

Q. Do you think he could dispose of any more than that number, Mr. Angle?

A. Yes, I do. [R. 339–340.]

The witness, on being asked whether or not a butcher cattle salesman could handle as many as 1,500 cars a year, replied:

> Taking the butcher cattle as they come on our market, carloads and mixed lots of butcher cattle, I would say yes. [R. 341.]

On being asked how the sale of hogs would compare with the sale of cattle, Mr. Angle testified:

> I am inclined to feel that men of like capacity, that the number of cars that either

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showed a disposition to testify as to his knowledge of actual individual performances of salesmen at the market, counsel insisted on holding him to average salesman performance for his firm (R. 343). If this witness had not meant exactly what he said, the fact would certainly have been developed in the course of the cross-examination.

> could sell, the hog man as compared to the cattle man, would not vary a great deal. The same principle applies in one department that applies in the other. [R. 341.]

When asked how many cars of sheep a good salesman could properly handle in a year, W. S. Angle, manager of the Producers Commission Association, replied:

> I should think that, conservatively, he could handle 1,500, or 2,000 cars [This refers to single deck cars]. [R. 342.]

Mr. W. B. Ecton, a cattle salesman for the Producers Commission Association, testified as to 1929 as follows:[27]

> I cannot give you any estimate of the number of cars of cattle I have sold this year. I have sold 75 to 100 cars lots of days in Chicago. I never had that many here. I could not sell 75 to 100 cars a day at the Kansas City market under present conditions. There are days when you can sell a large number of cars. * * * We have had days in which I have sold as many as 25

[27] Appellants have attacked Mr. Ecton's testimony on the ground that the salesmen of the firm which employed him had an average salesmanship performance of 432 cars in 1929 and that consequently the witness had not attained the performance-figure to which he testified. But the average of all the salesmen of the firm throws no light on Mr. Ecton's individual performance. Furthermore, Mr. Ecton's testimony can be taken as indicating that the firm did not receive a sufficient volume to enable its salesmen to exercise their full ability.

cars of cattle. One day this week we had 20 cars of cattle, and we got rid of them early. I sold the most of them myself. If the demand is right, we sell 25 just as easy as 5. From September on through the fall of the year we have our heaviest run of fat cattle. Taking the market as it is, and considering how the cattle come, a salesman could sell more than 1,500 cars of cattle in a year. I think he could sell more than 2,000 cars a year. I would be perfectly safe in saying he could sell 3,000 cars in a year. I am referring mostly to the class of cattle that I handle. In the feeder class, a man could sell more than that because they come in big bunches. I don't know how many a regular butcher man could handle. I don't think he could sell as many as 2,000 the way the shipments come to this market. The butcher cattle take more work and more time than the other kinds of cattle. We try to sell every day, and we carry over very little. [R. 365.]

* * * * *

There are 208 active market days during the year. If you looked around the yards there would be a lot of cattle salesmen going at 12 o'clock, if they got through down there. A lot of them leave the yards whenever they get through. I never heard of it if they stay there until 10 or 11 o'clock at night. There is nobody working on Sunday, unless it would be the office man or the watchman. * * * There is no doubt in my mind but that a cattle salesman could handle 3,000

cars in a year. I have never had a chance to handle that many on this market, but I feel sure that it could be done. [R. 367–368.]

Mr. John W. Murphy, a cattle salesman for the Bowles Livestock Commission Company, testified that, although he did not know how many cars of cattle he had in 1929 or 1930, he thought that he had, in his experience, handled as many as 1,500 cars of cattle in a year (R. 325–326). It was his opinion that under existing conditions at the Kansas City market he could handle the equivalent of 1,500 cars of cattle if he had them to sell (R. 327).[28]

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[28] Mr. Murphy's testimony reads as follows (R. 326–327):

Q. Now, taking your business as it is, how many cars do you think a good salesman could sell in a year, if he had them to sell?

Mr. GAGE. Now, just a minute. I object to that question. It is just as ridiculous and foolish to be asking questions like that in this hearing, as it would be to ask in a rate hearing, involving the rates of the Union Pacific Railroad Company for freight, how many tons of traffic they could handle in a year. It has nothing on earth to do with it, and wholly immaterial to any issue here. You can ask how many they have sold.

The EXAMINER. Objection overruled.

The WITNESS. Do I understand I am to answer that.

The EXAMINER. If you know; yes, sir.

A. I don't think there is a human being on earth could tell.

Q. Do you think he could handle as many as 1,500 cars and handle them properly?

Mr. GAGE. Objected to.

A. Yes.

Mr. GAGE. What?

The EXAMINER. Read the question.

(The last question read.)

Mr. GAGE. That is objected to for the reason given in the objection to the former question, and for the

W. M. Leitch Sheep Commission Company handled 267,391 head of sheep in 1931 and its two owners did all the selling and buying (Gov. Ex. 115, p. 68; Gov. Ex. 115B, p. 54). Mr. Charles F. Vieregg, a partner in this firm, testified:

> If twice as many sheep came to us, and they came in just the same way that they have come, that is the same proportions of different kinds, and classes, and types, and grades, and breeds, from the same sources, and so on, I do not know that it would be necessary to hire another salesman, but we would certainly have to rearrange our business. We would have to have some men at some end of the line. The chances are that Mr. Stover and I would sell them, but as it is we help sort them every day. * * * If we had twice as much, the chances are that we would do our selling just the same, but we would necessarily have to hire more men in the yards. The chances are that we would have to hire more people in the office, because that would take us away from our office if we had just twice as much under those conditions. [R. 454.]

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further reason that it fails to state the conditions under which they are to be handled.

Mr. BOHANNAN. Conditions just as they have been in the past year at Kansas City.

The EXAMINER. All right; objection overruled. Is the answer "yes", as stated above, or not?

A. Yes, but that would depend altogether on market conditions, climatic conditions, and various things that enter into livestock selling.

It is submitted that the witness' subsequent qualification did not detract from the weight of his direct answer.

The six cattle and calf salesmen of Swift & Henry Livestock Commission Company sold 138,133 cattle and calves in 1931. Mr. J. C. Swift, one of the owners of this firm, testified as follows (R. 1046):

> It is difficult to say what the peak carload maximum capacity of our firm is, but I would say without any hesitancy, that with a normal flow of business, Swift and Henry with their present organization, with practically no added expense, except such as would be incident to the account sales and few telegrams and things growing out of the increased business, could handle one-third more business, but as to any particular day, for one day we could handle more than that, particularly if we had a big run today and a slow market we would be jammed up.

If the volume of cattle and calves which that firm received in 1931 were increased by one-third and apportioned equally among the six salesmen, their average performance would have been more than 30,000 head per man.

It should be noted that the witnesses whose testimony has been described above expressed the opinion that a competent salesman, if he had enough volume to make it possible for him to operate in a reasonably efficient manner, could not merely equal the performance figures selected by the Secretary, but could exceed them. It is also significant that this testimony as to salesmanship

performance was not contradicted by any witness called by appellants.

Appellants have attacked this testimony as to the salesmanship performance which may be expected of a competent salesman if he receives a sufficient volume of livestock to enable him to operate in a reasonably efficient manner on the ground that it is opinion evidence. This description may be admitted without destroying the evidence or impugning its accuracy or force in any respect. It *is* opinion evidence, but it represents the opinions of men acquainted with the Kansas City market and well qualified to give expert testimony with respect to salesmanship performance. In view of the peculiar and abnormal conditions which exist in the Kansas City market, which will be described in detail below (*infra,* pp. 90–101), it would have been improper for the Secretary to accept without qualification and as the sole basis for determining reasonable costs evidence as to the average salesmanship performance of all salesmen on the market. In such circumstances, the testimony of these witnesses was more valuable than any evidence as to the average performance of all the salesmen on the market. It was certainly the best evidence available to prove what a salesman could do if normal and reasonable conditions prevailed in the market, and it is only on the basis of such conditions that reasonable rates can be prescribed.

Appellants' entire attack upon the Secretary's findings, and the evidence on which they rest, is based upon the unwarranted assumption that the Secretary was bound by the evidence as to the actual costs of salesmanship incurred by the market agencies operating in the Kansas City stockyards. For example, throughout their brief appellants assume that the mere fact that expenditures for salesmanship were made is alone sufficient proof of their reasonableness. Reduced to its essentials, their complaint seems to be that the Secretary should have ignored all the evidence before him except the evidence as to actual cost. These contentions and the assumptions upon which they rest disregard the evidence which was before the Secretary, and which, under the Act, he was obligated to take into account, which showed that abnormal conditions existed in the Kansas City market and that these conditions resulted in unreasonable and extravagant salesmanship costs.

The evidence showed that there were too many market agencies operating on the Kansas City market, either for the good of the agencies or the good of the producers.[29] Owners and representa-

[29] As has been pointed out above (pp. 20–26, *supra*), appellants' insistence that the Secretary exceeded his statutory authority because he attempted to limit the number of market agencies, is based on a misconstruction of the Secretary's order. The Secretary in his order (Par. 129, R. 90) recognized that the Packers and Stockyards Act gave him no authority to limit the number of market agencies. It is true

tives of the various commission firms testified that they were all involved in a constant struggle to increase their volume of business or at least to keep that volume from shrinking. Despite appellants' unfounded assertion that the firms employ extra men at peak seasons, the evidence discloses that the market agencies are not operating at a maximum capacity or maximum efficiency at any time.

Mr. J. C. Swift, president of Swift & Henry Livestock Commission Company, one of the larger firms operating at the Kansas City market, stated:

> The total volume of business at the central markets shows a constant decrease, and this naturally increases the competition for that business open to several markets. My firm struggles to maintain its volume and uses every legitimate effort to do so. Volume is our only salvation. The diminishing volume affects our gross returns materially. [R. 1035.]

A member of one of the leading sheep commission firms testified that his firm could handle twice its present volume of business without increasing its selling force (R. 454). Another wit-

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that the rates fixed by the Secretary may not preserve the existence, or the present selling organization of all of the existing market agencies, but as the District Court in *Tagg Bros. & Moorhead* v. *United States*, 29 F. (2d) 750, 755, stated:

> It was not incumbent upon the Secretary to fix the rates so high that all agencies in the business would make money, whether they did substantial business or not. The stock exchange itself did not attempt that.

ness testified that in 1930 he "had the organization to handle the 6,000 head of cattle which (he) did not get" (R. 672). Mr. J. C. Swift of Swift & Henry Livestock Commission Company testified that with a normal flow of business his firm could handle one-third more volume with practically no added expense (R. 1046). Mr. Frank Witherspoon of the Witherspoon Livestock Commission Company stated that if his firm had received the volume which it formerly received, it would have been able to reduce units costs (R. 921) and that an increased volume would have enabled the firm to increase salaries (R. 930).

Witnesses connected with the production end of the livestock industry were decidedly of the opinion that there were too many commission firms operating on the Kansas City market from the standpoint of benefit and efficient service to the producers.

Mr. J. H. Mercer, Livestock Commissioner for the State of Kansas, testified at the first hearing before the Secretary that:

> If there were a reduction in the number of firms and people who are engaged in the livestock commission business at Kansas City, it is my opinion that they could still handle the business and very much better than it is now being handled. I would say that at least 30 or 40 firms could handle the business. [R. 276.]

At the second hearing the witness reiterated his former views, saying:

> The livestock industry is in a much less favorable condition today to pay its marketing costs, or any costs for that matter, than it was two years ago. Prices are lower. This, coupled with all other correlated business on the farm, has produced a condition in the industry much worse than it was two years ago. [R. 811.]
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> * * * * *
>
> It is easy for the livestock exchange merchant to say that his business is being conducted at a loss, but when he realizes that his patrons have become almost insolvent because of a decline in the value of their livestock, it is time for the commission merchant to face the fact that he must make concessions even though it be to his own disadvantage. These concessions would be reduction in cost, cooperation, working more closely together, consolidation of the business, elimination of unnecessary concerns [R. 811–812.]
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> * * * * *

Mr. J. W. Hudelson, a livestock producer and a director of the Kansas Livestock Association, who participated in the appraisal of owners' services made by appellants, testified on cross-examination:

> I read Mr. Mercer's testimony and agree with the most of it. I have always contended that there were too many in the business.

> It is a slight run today, but one-third of the people could do the work, with the exception of a few days in the fall of the year when there are heavy runs. I would say half could do the business that is done at the stockyards here. If there were half the men engaged in the commission business, I think we would have a more stable market, and we could have some control at least over the volume of cattle that would be shipped on the various dates. There should be competition between individual agencies for business because it spurs them on to greater effort and more efficient service. [R. 595.]

Mr. F. E. Mollin, secretary of the American National Livestock Association, an association of producers, testified:

> It is possible that there are too many speculators just the same as there are too many commission firms. I took occasion to look up the number of commission firms on this market and I note that they have been increasing since 1922 while the receipts have been decreasing, according to the yard company's report. [R. 247.]
>
> * * * * *
>
> The livestock industry today is in the dumps and cattle are losing money. We should pay only a fair and reasonable charge for service. It is pretty hard to say just what the immediate effect on the industry would be but it is the total effect of all the charges that go into it. If you say one little

> charge is not of any effect and there is another, the grand total makes a considerable difference. We think that the nature of your business here has been such that it has attracted more men than are needed to conduct the service and that makes it tough for all of you. I think the only practical way to regulate the number involved in the business is through establishing reasonable rates based on good service and efficiently operated firms. [R. 248–249.]

Certainly it is not necessary to have from 50 to 60 firms to handle the volume of business received at the Kansas City market. The Secretary found that 11 of the 61 firms on the market in 1931 handled over 50% of the business and 24 firms handled over 75% of the business. Furthermore, 17 firms handled less than 500 cars of livestock each during the year and 5 of those firms handled less than 100 cars each. (Par. 86, R. 68–71.)

The Secretary pointed out in his order (Par. 113, R. 82):

> Notwithstanding the unfavorable business conditions and lowered receipts in 1931, as compared with 1929, few of respondent firms operating in both of those years showed any substantial reduction of personnel in the former as compared with the latter. Also, few firms made any substantial reduction in salaries and wages sufficiently early in the year 1931 materially to affect their cost of doing business as shown

> in the audits covering that year. Such decreases as were made took place largely in the latter part of the year 1931 and in the year 1932. The general impression gained from the record is, however, that respondents, in the face of almost universal lower levels in the United States, are attempting to maintain their personnel and the salaries thereof at the levels obtaining in the more prosperous year, 1929.

This finding of the Secretary is fully supported by the record. Record 717, 729–730, 745, 749, 795, 881–882, 1077; see also schedule 2 of Gov. Ex. 14–1 to 14–86; and Gov. Ex. 114–1 to 114–107, pp. 1–107.

An examination of the selling organization of a few typical firms indicates that there is a wide variation in average volume of business handled by the salesmen of the different firms. Firm No. 12 employed four full time salesmen and one full time buyer to handle the equivalent of 2,450 cars of livestock (Gov. Ex. 115, p. 57; Gov. Ex. 115B, p. 13). Firm No. 15 carried three full time salesmen to handle the 702 cars of livestock (Gov. Ex. 115, p. 57; Gov. Ex. 115B, p. 21). Firm No. 16 had five full time salesmen handling 988 cars of livestock (Gov. Ex. 115, p. 57; Gov. Ex. 115B, p. 23). Firm No. 29 had three full time salesmen and one full time buyer handling 962 cars of livestock (Gov. Ex. 115, p. 57; Gov.

Ex. 115B, p. 39). Firm No. 35 had eight full time salesmen and one full time buyer handling 2,418 cars of livestock (Gov. Ex. 115, p. 57; Gov. Ex. 115B, pp. 46–47). Firm No. 46 had eight full time salesmen and four full time buyers handling 5,641 cars of livestock (Gov. Ex. 115, p. 57; Gov. Ex. 115B, pp. 56–57). Firm No. 54 had the equivalent of eight and a half full time salesmen and two full time buyers to handle 8,544 cars of livestock (Gov. Ex. 115, p. 57; Gov. Ex. 115B, pp. 69–70). Firm No. 59 had ten full time salesmen and the equivalent of 3¼ buyers handling 7,022 cars of livestock (Gov. Ex. 115, p. 57; Gov. Ex. 115B, pp. 76–77). Firm No. 77 had four full time salesmen handling 906 cars of livestock (Gov. Ex. 115, p. 57; Gov. Ex. 115B, p. 110).

These performance figures when contrasted with the uncontradicted testimony, above set out, as to the performance which an efficient salesman could reasonably be expected to attain, demonstrate better than any other kind of proof the obviously overmanned condition of the market and the impossibility under present conditions of attaining reasonable salesmanship performance with the result that as the situation now stands the shippers as a class have to bear the burden of wholly unreasonable salesmanship costs.

The foregoing analysis of selling organizations indicates that many firms are maintaining unneces-

sarily large selling organizations. At first glance it might appear that provident management would operate to cause each firm to keep down the number of its salesmen to the minimum. However, the conditions existing in the Kansas City market and the peculiar nature of the business of the market agencies operate in the opposite direction. The business is one of rendering personal service and requires a very small outlay of capital. Furthermore, a person with a following among shippers can expect a certain volume of business from that following at little or no cost. Therefore, if commission rates are maintained by agreement as they are here at a relatively high uniform rate it is on the one hand an incentive for such a person to go into the business as an independent market agency; and on the other hand, if he is an employed salesman, there is an incentive for his employer to retain him in his employment for fear of losing the business which he personally controls. As a result, so far as the rates will permit it, there is a constant tendency for more persons to be engaged in salesmanship than are reasonably needed to perform the work.

It is these conditions which the Secretary had in mind when he classified salesmanship costs as a kind of costs which conditions in the business tended to increase (see pp. 58–59, *supra*). Furthermore, these conditions tend to maintain unduly

large selling organizations. It is a fair inference from the record that a firm in many cases will retain a salesman who controls a small amount of business, merely in order to retain that volume of business and to preclude the possibility of his becoming a competitor as an independent agency, and even though the salesman is unnecessary to the selling organization (R. 112). Furthermore, as will be explained below (*infra*, pp. 112–115), market agencies in some cases hire additional salesmen who have a following in order to increase their volume of business, even though the salesman is not needed to handle the livestock received by the firm, including the additional volume of business which he brings with him. The inevitable result of these conditions is to burden the unit cost of salesmanship with salaries that have no relation to the reasonable costs of salesmanship or to the actual selling service rendered to the producer. Because of the excessive number of firms and salesmen, a computation made on the basis of aggregate, actual, or appraised salaries for all salesmen on the market, or even for selected groups of those salesmen, would not furnish the Secretary with any adequate test of the reasonable cost of salesmanship. Under the Packers and Stockyards Act the duty of the Secretary is to prescribe reasonable rates, and the proper performance of that duty requires him in this case to reject the actual costs of salesmanship

at the Kansas City market as the sole test of reasonable salesmanship costs.[30]

These abnormal conditions make it impossible for even a competent salesman to operate in the Kansas City market at a reasonable degree of efficiency. Consequently, it is not surprising that a great majority of the salesmen do not sell as many head of livestock as the witnesses testified a salesman should be able to sell if his services were utilized under conditions which made reasonable efficiency possible. That does not prove, as appellants seem to believe, that this testimony should be disregarded or that the performance figures selected by the Secretary on the basis of that testimony are unreasonable. The reasonableness of the Secretary's finding cannot be tested by comparison with the low salesmanship performances which are caused by the present overcrowded and abnormal conditions existing in the Kansas City market. Despite the fact that actual

[30] It is interesting to note that the commission firms in *Tagg Bros. & Moorhead* v. *United States*, 280 U. S. 420, made exactly the same contention which is being made by the appellants in this case. In presenting their case to the master appointed by the District Court, they argued that the Secretary's allowance would not cover the actual salesmanship costs as experienced by the various agencies during the test period. On the basis of this argument, the master stated as one of his reasons for holding the rates confiscatory that they would fail by $294,477.20 to produce salesmanship costs. (*Tagg* record, p. 112.) This finding by the master was reversed by the District Court, 29 F. (2d) 750, and that reversal was sustained by this Court, 280 U. S. 420.

performance cannot be accepted as a test of reasonableness, it should be noted that the record shows that in fact there are some salesmen at the Kansas City market who attain or approximate the performance figures selected by the Secretary even under the conditions above described which render efficient use of their time and efforts by each of the salesmen employed in an overcrowded market practically impossible.

For example, John Clay & Company in 1931 sold 117,345 head of cattle and calves (Gov. Ex. 115, pp. 65, 66). Taking the year as an entirety, $4\frac{5}{12}$ salesmen were required to sell this number of cattle and calves.[31] Dividing the volume by this number of salesmen, it appears that each salesman sold an average of 26,568 head, or 2,432 head under the performance figure taken by the Secretary.

A salesman for the Moffett Livestock Commission Company testified that on the preceding Monday his firm had 34 cars of cattle to sell and all but

[31]Appellants assert that this firm required 4 full time salesmen and 2 extra salesmen to sell the cattle and calves (appellants' brief, p. 109). In support of this statement, appellants cite Government Exhibit 115B. That exhibit does not disclose what months the 2 part time men were employed but does show that one man was employed for a period of 7 months and the other for a period of 4 months. Furthermore, Government Exhibit 115B, page 69, indicates that one of the so-called full time salesmen, Mr. James Reid, was manager of John Clay & Co., of Kansas City and devoted only one-half of his time to selling and related services and the remainder to his other duties. On the basis of these facts it is clear that if the year is taken as a whole, the company employed only $4\frac{5}{12}$ salesmen.

10 head were sold on that day by the three cattle salesmen selling for the firm (R. 542). Assuming that each salesman handled one-third of the cattle, it appears that all three sold more than twice as many cattle as would be considered a reasonable day's performance under the Secretary's finding.[31a]

The Bowles Livestock Commission Company sold 49,973 head of cattle (excluding calves) in 1931 (Gov. Ex. 115, p. 65). Two salesmen disposed of these cattle.[32] Murphy, one of these two salesmen, spends approximately 20% of his time on other duties (Gov. Ex. 115 B, p. 13). It thus appears that the two cattle salesmen approximated the performance figure selected by the Secretary.

John Clay & Company, in 1931, sold 565,861 head of sheep (Gov. Ex. 115, p. 68). That firm employed two sheep salesmen (Gov. Ex. 115B, p. 69). Thus it appears that the average salesmanship performance for each of these salesmen was 282,930 sheep, or approximately 33,000 head in excess of the salesmanship performance of 250,000 head which the

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[31a] A salesman selling, throughout the year, an average of 5 carlots per market day or 20 carlots per market week would attain the performance figure selected by the Secretary for the purpose of determining reasonable salesmanship costs.

[32] Government Exhibit 115 B, page 13. It appeared that Hopkins, the cattle buyer, helped to sell some cattle (R. 315), but it also appeared that the two cattle salesmen helped in the buying of cattle (Gov. Ex. 115B, p. 13). A third salesman listed as a cattle salesman sold only calves.

Secretary used for the purpose of determining reasonable costs.[33] In addition, these same two salesmen bought 25,167 head of sheep.

Cassidy-Southwestern Commission Company employed one salesman, Mr. Oscar Moody, to sell and yard all of the 150,283 head of sheep handled by the firm in 1931 (Gov. Ex. 115, p. 68). Mr. Moody was paid $2,937.50 for his services in 1931 (Gov. Ex. 115 B, p. 123). Since he did both the selling and yarding of these sheep he is entitled to compensation for both services. The Secretary found that the reasonable cost for selling and yarding sheep is $.014 and $.008 per head respectively, or a total of $.022 per head. This figure applied against the volume of sheep handled by this firm is approximately $3,300 or nearly $400 in excess of the salary actually paid for the performance of these services by this firm. The

[33]Appellants attempt to disparage these figures by stating that the salesmen were assisted by a sheep yardman in selling during peak periods (appellants' brief, p. 137). On the page of the record which appellants cite (R. 459) the head sheep salesman for John Clay & Co., testified:

> We also have a yardman who has been with us a considerable time, who is getting to a point where he can sell some drive-ins and all of us more or less still do considerable yard work in helping each other get the sheep sorted and getting them to the scales.

There is no support for appellants' assertion that the yardman is forced to give substantial help to the selling during any peak period and it seems clear from the testimony that the assistance he gives in selling is not sufficiently substantial to change materially the salesmanship performance referred to above.

unit cost found reasonable by the Secretary for selling and yarding sheep cannot be said to be insufficient or unreasonable as applied to the sheep business of this firm.

The evidence shows that one of the two salesmen of Farmers' Union Livestock Commission Company in 1931 attained the salesmanship performance figure used by the Secretary. In 1931, the two salesmen sold 147,922 head of hogs (Gov. Ex. 115, p. 67; Gov. Ex. 115B, p. 134). One of the two salesmen is paid a salary of $8,800 a year; the other one a salary of $2,200 a year. It may be assumed that the higher priced salesman sold by far the greater number of hogs, and this assumption is fully supported by the testimony of the head salesman, Mr. H. W. Garrison, who testified (R. 442):

> My assistant salesman early in the morning is practically a head yardman. He weighs the stuff that he sells and does the sorting and does as much work as a yardman as he does as a salesman. The proportion of hogs sold by him will vary at different times of the year. I expect he will sell one-fourth of them when light hogs and stock pigs are running heavy. It would not be that much now. I sell the bulk of the hogs right now because they are coming good and heavy.

It appears that Mr. Garrison in 1931 sold more than the 85,000 head of hogs which the Secretary

found to be a reasonable salesmanship performance. Mr. Garrison testified that a few days previously he had handled 21 carloads of hogs and 300 or 400 truck hogs. He added that it was a bad market day and he had to work until three o'clock in the afternoon to get them sold. (R. 442–443.) The same witness testified that on his biggest day he had sold with the help of his assistant 58 loads out of 62 loads which he had to sell (R. 443). It appears that Mr. Garrison has sold as many hogs in one day as the Secretary found a salesman might be reasonably expected to handle in a week.

A similar inference may be drawn from the testimony with respect to the Harry Kennaley Commission Company. In 1931 that firm handled 159,184 head of hogs (Gov. Ex. 115, p. 67). The hogs were sold by Harry Kennaley and two assistants. Government Exhibit 115B, p. 62, shows that the two assistants were primarily yardmen and that Mr. Kennaley spent 40% of all of his time in selling hogs.[34] It seems clear that the bulk of the 159,184 head of hogs was sold by Mr. Kennaley and that in 1931 he equaled or approximated the performance figure of 85,000 head which was used by the Secretary in determining reasonable costs.[35]

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[34] J. M. Laster, one of the yardmen, spent 15% of his time selling hogs, and the other, Joseph Keaney, who was employed for two months at a salary of $750, spent 40% of his time selling hogs and 60% of his time in yarding.

[35] Appellants attempt to disparage this fact by pointing to certain affidavits which were filed subsequent to the entry of the Secretary's order, which disclose that this firm

The testimony with respect to the firm of Martin, Blomquist & Lee is also significant. This firm handled 150,806 head of hogs in 1931 with two salesmen, each salesman thus having an average salesmanship performance of 75,403 hogs (Gov. Ex. 115, p. 67; Gov. Ex. 115B, pp. 86–87). One of these salesmen was an owner and the other an employee. The employed salesman received a salary of $2,812. The owner received from the firm a return of $6,375. (Gov. Ex. 115B, pp. 86–87). In view of the relatively low salary of the employee, it may properly be assumed that the owner sold the greater number of the hogs and thus approximated or exceeded the Secretary's performance figures.

3. *There Is No Merit in Appellants' Contention That the Secretary Disregarded "Variable Factors" Affecting Salesmanship Performance*

Appellants contend that "the Secretary completely disregarded uncontradicted evidence of numerous uncontrollable and variable factors affecting salesmanship performance" (appellants' brief, p. 125). The so-called variable factors which appellants appear to have chiefly in mind are (a) sea-

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has gone out of business and by referring to Mr. Kennaley's testimony that he received so many hogs that he did not give a good many of them "the right kind of selling, feeding or handling." It may be pointed out, however, that inasmuch as the Kennaley Commission Co. received more hogs than any other commission agency at the market in 1931, Mr. Kennaley's difficulties did not impair his efficiency to such an extent as to cause his customers to be dissatisfied and to ship to other firms.

sonal variations in the arrival of livestock, and (b) variety in grade and types of livestock and in identity of ownership.

So far as variations in grade and type of livestock are concerned and in identity of ownership, there is no support in the record for appellants' assertion that the Secretary disregarded these variations, either in determining reasonable costs or in fixing rates. The Secretary's findings with respect to the manner of arrival of livestock at the market (paragraphs 23–29 of Secretary's Findings, R. 38–41) show that the Secretary was aware of, and took cognizance of, these variable factors. Furthermore, the structure of the tariff which the Secretary prescribed made adequate allowance for these variations by providing graduated charges according to number and weight of the animals in a consignment.

The Secretary also made adequate allowance for seasonal fluctuations in the arrival of livestock at the Kansas City market. It is significant that although appellants frequently refer to these so-called "peaks" in the arrival of livestock and complain of the Secretary's failure to make proper allowance for fluctuations, they did not introduce any evidence showing in concrete manner the extent to which these fluctuations affect salesmanship performance, nor have they made any suggestions in their brief with respect to any particular allowance which the Secretary should have made, but failed to make, with respect to these variations.

As a matter of fact, the evidence in the record indicates that the fluctuations in the arrival of livestock are much less serious than appellants suggest and do not affect salesmanship performance to nearly the extent that the appellants would have this Court believe.

The evidence shows that livestock which arrives by truck arrives more evenly throughout the year and the days of the week than does livestock which arrives by rail (Resp. Ex. 35, pp. 2–9, R. 1091). Inasmuch as the receipts of livestock by truck are increasing at the Kansas City market (Gov. Ex. 15, 115; Resp. Ex. 37, p. 2; R. 431), it appears that the seasonal variations in the arrival of livestock are tending to disappear. The following table (compiled from Gov. Exs. 16 and 116) shows that the monthly fluctuations at the market have been steadily decreasing since 1929.

Percentage of cattle and calves arriving at the Kansas City stockyards by months for the years 1929, 1930, 1931

Month	1929 percent of total	1930 percent of total	1931 percent of total
January	7.69	8.09	7.99
February	5.75	6.77	6.89
March	6.25	7.43	7.61
April	6.86	7.46	7.15
May	6.00	5.99	6.22
June	5.50	6.11	6.47
July	7.90	6.52	6.02
August	9.02	8.12	10.24
September	13.78	12.55	10.02
October	13.70	13.60	12.73
November	9.45	8.53	11.65
December	8.10	8.83	7.01
Total	100.00	100.00	100.00

It has been pointed out at p. 101 above that the cattle salesmen for John Clay & Company were achieving a standard of performance which approached the performance figures used by the Secretary (*supra,* p. 101). Comparing the monthly receipts for that firm with the monthly receipts for the whole market, it is apparent that the business of that firm is subject to seasonal variations to a somewhat greater extent than is the volume of livestock received by the market as a whole. The following table clearly illustrates this fact:

Monthly cattle and calf receipts for John Clay & Company as compared with total monthly cattle and calf receipts for the Kansas City market for 1931, stated in carload equivalents (Gov. Ex. 113 F)

Month	John Clay & Co., cattle and calf receipts	Total market cattle and calf receipts
January	212	4,647
February	184	4,270
March	246	4,453
April	283	4,152
May	327	4,174
June	337	4,086
July	227	3,972
August	369	6,456
September	351	6,160
October	549	7,553
November	500	6,770
December	252	4,720

If the cattle salesmen for John Clay & Company could approximate the Secretary's performance figure under these circumstances, it is not unreasonable to expect other good salesmen to do likewise.

Counsel for appellants in the extensive hearings before the Secretary were unable to develop any testimony indicating that the so-called peak seasons throw such a volume of livestock on the market that the salesmen are unable to handle it. Many of the statements in appellants' brief with respect to the effect of the peak seasons are not supported by the record. For example, they say (appellants' brief, p. 108–109):

> Moreover, seven of the twenty-six [market agencies], although, according to the hypothetical standard, already overmanned with regular salesmen, found it necessary to employ one and sometimes two extra salesmen in the peak season to dispose of the number of cattle consigned to them for sale.

To support this assertion they set out a table purporting to show the "number of extra employed salesmen" for seven leading commission companies and cite Government Exhibit 115 B as the basis for the table (appellants' brief, p. 109, footnote 4). This is a grotesque and flagrant distortion of the record, because Government Exhibit 115 B does not show that extra salesmen were employed at peak seasons. The exhibit mere shows the number of part time salesmen who were employed in 1931 by the various commission firms. The exhibit does not show when the salesmen were employed or the reason for their employment. This assertion of

appellants is entitled to no weight whatsoever.[36] The only possible way in which appellants could have established this assertion would have been to have had the owners or managers of the market agencies go on the witness stand in the hearings before the Secretary and testify as to their motives

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[36] The work papers which were the basis of Government Exhibit 115 B show the facts with respect to the employment of these salesmen. These work papers were introduced as evidence in the second hearing before the Secretary (R. 825), and were marked Government Exhibits 114–1 A to 107 A. Because these exhibits were not certified as part of the record before this Court, appellees do not feel justified, despite appellants' distortion of the facts, in referring to the facts contained in these exhibits.

Exhibits before this Court indicate, however, why the conclusion which appellants draw from Government Exhibit 115 B is unwarranted. For example, one of the two part time cattle and calf salesmen shown by Government Exhibit 115 B to have been employed by John Clay & Company was Gerald Haggert. The same Exhibit shows that in 1931 Mr. Haggert was a member of the firm of Haggert-Wilson Livestock Commission Company (Gov. Ex. 115 B, p. 86). *So far as the Exhibit shows Mr. Haggert may have been with his own firm throughout the peak season in 1931.* Similarly, Government Exhibit 115 B, page 15, shows that one of the part time cattle salesmen employed by the Crider Commission Company was Mr. Ira Kimmons. The same exhibit shows, on page 128 that Mr. Kimmons was in business for himself in 1931. In view of those facts, it is arguable that Kimmons was employed because he controlled a volume of business and not because help was needed during a peak season.

Government Exhibit 115 B (p. 73) shows that the firm of Wright & Baucus hired C. M. Davis in 1931. The same

in hiring these additional salesmen. The fact that they failed to do this is significant.

While there is not sufficient evidence to disclose the exact reason for some of the commission firms employing extra salesmen throughout the year, there are a number of factors which were doubtless contributory causes of this action. Of these factors the most important is the possibility of acquiring some additional business by hiring an extra salesman for a short period of time. This factor is not developed at length in the evidence, although Mr. B. C. Biggerstaff, the Secretary of the Livestock Exchange, testified:

> Rule 5–A [illegible]le 7 of the Rules of the Exchange grew up out of the commission firms employing men rather seasonally. It simply prohibits hiring a man and paying a contingent salary on the basis of the business he is able to bring in. He has got to pay him a salary. It is designed to protect the business of the individual firms from expenditures which simply involve the accumulation of a volume of business. Men from Oklahoma would come up here who had 7,000 or 8,000 cattle and they would

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exhibit (p. 65) shows that in 1931 C. M. Davis was a member of the firm of Jefferson, Lowery & Davis. Here again it may be argued that Mr. Davis was employed not because help was needed in the peak season but to obtain the volume of business which he controlled as an ex-member of another market agency.

> hire themselves out to the commission firms for three or four months for a salary that was out of line with their worth. They could not sell anything. It just became so obnoxious that the Exchange stopped it. [R. 270.]

Obviously this rule does not prevent a market agency from hiring a part time man on a flat salary basis in order to obtain the business which he controls.

The lack of foundation for the conclusions which appellants have drawn from the fact that some firms employ part time salesmen is emphasized by an examination of some of the other firms that hired extra salesmen. Firm No. 6, with two full time cattle salesmen, employed a part time cattle salesman to aid in handling a total volume of 487 cars of cattle and calves in 1931 (Gov. Ex. 115, p. 57; Gov. Ex. 115 B, p. 6). Firm No. 63, having one full time sheep salesman, employed one part time salesman to aid in selling 251 cars of sheep (Gov. Ex. 115, p. 57; Gov. Ex. 115 B, p. 86). Firm No. 82, having one full time hog salesman, employed an extra hog salesman part time to aid in selling 428 cars of hogs (Gov. Ex. 115, p. 57; Gov. Ex. 115 B, p. 116). Firm No. 83, having one employee listed as a full time hog salesman and bookkeeper, employed a part time hog salesman to aid in selling 54 cars of hogs (Gov. Ex. 115, p. 57; Gov. Ex. 115 B,

p. 119). Firm No. 87, having one full time sheep salesman, employed a part time sheep salesman to aid in selling 402 cars of sheep (Gov. Ex. 115, p. 57; Gov. Ex. 115 B, p. 126).

Appellants attack the salesmanship performance figures selected by the Secretary by contending that in some cases firms which had enough owner salesmen to attain those figures nevertheless were forced to employ additional salesmen to handle that volume of business (appellants' brief, p. 114). The fallacy in appellants' reasoning lies in the fact that they do not show that the owner salesmen were unable to sell the volume received, nor do they show the reason that additional salesmen were employed. The mere fact that a firm hires a salesman is no indication that that salesman is needed to sell the volume of livestock which the firm receives. It is just as likely that a firm will hire an additional salesman because it is receiving an insufficient volume as it is that the salesman will be employed because the firm is receiving a greater volume than it can handle. The reason for this is that the livestock business is a personal service business and customers tend to follow a salesman.

If appellants had really thought that such figures were of value in proving the number of salesmen required to handle any particular volume, they could have made a much stronger showing than they actually did. Firm No. 6, having one full

time owner salesman, employed a salesman for twelve months and another salesman for seven months to assist in handling a total volume of 487 cars of cattle and calves (Gov. Ex. 115, p. 57; Gov. Ex. 115 B, p. 6). Firm No. 15, having one full time owner cattle salesman, employed an additional salesman for the full year to assist in selling a total volume of 417 cars of cattle and calves (Gov. Ex. 115, p. 57; Gov. Ex. 115 B, p. 21). Firm No. 71, having two owner cattle salesmen, employed three full time salesmen and one full time buyer to assist in handling 1,952 cars of cattle and calves (Gov. Ex. 115, p. 57; Gov. Ex. 115 B, pp. 97–98). The owner salesman for Firm No. 74 had to employ another full time salesman to assist in handling 277 cars of cattle and calves (Gov. Ex. 115, p. 57; Gov. Ex. 115 B, p. 104). Firm No. 76, having one owner salesman, employed two additional salesmen to aid in handling 303 cars (Gov. Ex. 115, p. 57; Gov. Ex. 115 B, p. 108). The one owner cattle salesman for Firm No. 79 employed an additional salesman to aid in selling 330 cars (Gov. Ex. 115, p. 57; Gov. Ex. 115 B, p. 114). If the experience of these firms is to be taken as indicative of reasonable salesmanship performance, it would appear that many a salesman could not be expected to sell more than one carlot of livestock a day. These instances fully demonstrate how flimsy are the conclusions which appellants' counsel seek to draw from the employment of additional salesmen.

4. *There Is No Merit in Appellants' Suggestion That the Secretary Should Determine Reasonable Salesmanship Costs on the Basis of the Price Obtained by Salesmen for the Livestock Which They Sell*

Appellants suggest that "price, not volume or speed, is the test of the salesman's ability and value" (appellants' brief, pp. 19–20, 134–135) and by commenting on the variations in the average price realized by the various market agencies' attempt to create the impression that these variations indicate variations in efficiency (appellants' brief, pp. 19–20, 57–58).

Appellants make no suggestions as to how salesmanship efficiency could be measured in price received. Indeed, it seems clear that as a practical matter no such test can be applied. A salesman who devotes all of his time to selling and who in a year's time sells only 50 or 75 or 100 carloads of cattle cannot be regarded as spending his time efficiently no matter what price he obtains for the livestock. The basic difficulty with appellants' argument on this point is that it assumes that a high volume performance by a salesman is necessarily accompanied by a low per head price realization. The record indicates otherwise. John Clay & Company and Swift & Henry Commission Company were the two firms having the highest average per salesman performance as to cattle and calves. They were among the highest in per head

realization for cattle. Appellants have quoted at length testimony of Mr. Olander (appellants' brief, pp. 24–27) apparently for the purpose of showing among other things that he cannot be expected to sell a large volume because of the careful attention he gives to each sale. In this connection it is significant that his firm, National Livestock Commission Company, ranks high among the market agencies in volume of livestock handled (appellants' brief, p. 18).

Actually, the average per head realization for any agency may depend upon any one of a great number of factors other than the ability of its salesmen. Since cattle are bought and sold on a weight basis, a firm the bulk of whose business consisted of light weight cattle would receive a much lower average price per head than another firm the bulk of whose business consisted of fat steers. Likewise, a firm which dealt mainly in stocker and feeder cattle would not receive as much per head as some other firm would receive for the same cattle when those cattle were subsequently returned to the market for sale. Also, methods of feeding cattle vary in different areas (R. 224, 262), and these variations affect their value. Price depends directly upon quality (R. 257, 331), which may depend upon origin (R. 307, 331, 512), care and feeding (R. 369), age (R. 538), and breed (R. 538). The number of variations of grade and quality is graphically illustrated by appellants' Exhibit No. 34.

While volume is certainly not the sole test of efficiency, the practical necessities of the business require that a salesman sell a certain volume efficiently before he can be called a good salesman. As a matter of fact, the handling of a number of loads of cattle each day was declared by one of appellants' own witnesses to increase the efficiency of a salesman. W. C. Bradshaw testified as follows:

> A salesman is at his most efficient point when he has enough cattle so that he knows the value and condition of the market. I should say that a salesman selling a number of loads of cattle each day would be better posted and in a better position to get the most for his customer, on the average, than the man who has one or perhaps two loads of cattle a day, and maybe one or two loads of cattle a week, but there is a point at which the efficiency of a salesman is very materially reduced when he has so many loads of cattle that he cannot give any of them the proper attention, proper care, and proper sales ability. I feel that our force was able to sell the 31 loads last Monday efficiently. [R. 542–543.]

5. In Determining Reasonable Salesmanship Costs the Secretary Followed the Principle Applied in Tagg Bros. & Moorhead v. *United States, 280 U. S. 420*

Appellants insist that the Secretary in determining reasonable salesmanship costs failed to follow the principle applied in *Tagg Bros. & Moorhead* v. *United States,* 280 U. S. 420. They state that in

the *Tagg Bros.* case the Secretary used "typical experience in making his allowances" and that:

> An examination of the record of the *Tagg* case in this Court (No. 45, Oct. Term, 1929) shows that the avowed plan which the Secretary followed as stated in his findings in determining allowable costs was to adopt "a normal of the actual cost of the particular item to those firms whose financial condition exhibits ordinary efficient management of their business" (FF. 14, R. 32 of *Tagg* record). [Appellants' brief, p. 133.]

An examination of the record in the *Tagg Bros.* case and of the opinion of the District Court shows that these assertions of appellants are absolutely without foundation and that in that case the Secretary did not base his findings as to salesmanship performances on "typical" or "normal" salesmanship performances. In the Secretary's order in the *Tagg Bros.* case he said, immediately after discussing in a general way the use of *normal* costs as a means of determining reasonable costs (Par. 16, p. 32, *Tagg* record):

> *The foregoing applies particularly to costs other than salesmanship.* The cost of salesmanship per car is arrived at in the following manner: a number of the respondents who were questioned as to the number of cars of each species of livestock that an ordinarily efficient salesmen of a particular species could sell in a reasonably efficient manner in one year did not express an opinion. A shipper who is frequently on the

> market at Omaha testified that such a cattle salesman could so sell from 2,000 to 3,000 cars and such a hog salesman could so sell from 2,500 to 3,500 cars, provided each had opportunity for the full exercise of his ability. No witness expressed an opinion as to the number of cars of sheep an average salesman could handle efficiently in one year, but a sheep salesman stated that on a Monday during the hearing he sold ten cars and during that week twenty cars, though receipts were not then as large as they had been, and he could have sold more. [Italics supplied.]

The Secretary then proceeded in that case to determine by investigating the salaries of employed salesmen what salary he would associate with a reasonable performance, and stated (Par. 18, p. 34, *Tagg* record):

> Therefore, $5,000 per year as to cattle and sheep and $4,000 per year as to hogs is considered to be the fair market value of the services of a good salesman in those respective lines. Upon the foregoing basis it is considered that a reasonable cost per car for salesmanship is $5 for cattle, $3 for hogs and $5 for sheep.

The Secretary's order in the *Omaha* case does not go into as great detail in explaining the basis for his choice of performance figures as does his order in this case. It is clear nevertheless that the same method was followed in both cases. The Secretary associated a salary figure with a per-

formance figure, and in the *Omaha* case as in the instant case he selected the performance figure because it was reasonable and not because it conformed to the average performance of all the salesmen on the market or the average performance of the salesmen of any so-called "typical" firm or group of firms. The discussion of the Secretary's method in the opinion of the District Court in *Tagg Bros. & Moorhead* v. *United States,* 29 F. (2d) 750, which is quoted in the footnote below, shows that the method there used by the Secretary does not differ materially from the method which he employed in the instant case.[37]

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[37] The District Court in *Tagg Bros. & Moorhead* v. *United States*, 29 F. (2d) 750, 754–755, said:

> The plaintiffs say that the per car limit for selling is so low that it is not compensatory, that it is below actual cost, that it is confiscatory, and that it will cause many of them to do business at a loss, and so be driven out of business. There is no uncertainty about how the Secretary came to use the per car limit for selling as a cost item in service in arriving at the rates in his schedule. It was shown to the Secretary that some of the men who do this selling on the market sell a great many cattle, and some sell very few. Some are working for high wages, and some for much lower, and others again, as owners of the business, charge all there is left in the business, after paying expenses, to this selling job performed by themselves.
>
> The Secretary was not concerned with nor attempting to say just what a cattle salesman should be paid. It was his task to find a maximum per car for this work, beyond which anything charged would be unreasonable. To that end he considered how many cars a man could sell in a day, if he had the cars to sell, and also how many cars the men engaged actually do sell in the course of the business. From the whole the Secretary concluded that good cattle and sheep sales-

B. THE SECRETARY'S FINDINGS AS TO THE REASONABLE COSTS OF GETTING AND MAINTAINING BUSINESS ARE FULLY SUPPORTED BY THE EVIDENCE

To cover the non-salary costs of business getting and maintaining activities for the market agencies at the Kansas City market, the Secretary allowed 10% of the total of the costs and profits found to be reasonable. The salary costs incident to this item are included in salesmanship salaries, owners' compensation, etc. (Order, Par. 148, R. 104–110).

Appellants have attacked this allowance as unreasonable and arbitrary. They say that "As distinguished from the *Tagg Bros.* case in which the allowances were 'a normal of the *actual* cost of the particular item in their business,' the allowance is purely arbitrary, as any overhead allowance of a given percentage must be" (appellants' brief, p. 146). But appellants nevertheless have failed to point to any real difference between the treatment of business getting and maintaining in the *Tagg Bros. & Moorhead* case and in this case.[38]

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men were being paid salaries of $5,000, and hog salesmen $4,000, and that any good cattle and sheep salesman can readily sell 1,000 cars of cattle or sheep in a year, if he has that many to sell, any good hog salesman could easily sell 1,333 cars of hogs in a year. There was in fact uncontradicted proof that each could sell many more cars. If he sells more cars per year, as some salesmen do, the Secretary has done nothing to prevent more than $5,000 being paid to the salesman, either as a wage or as a charge against the business, if the salesman is the owner. * * *

[38] For the Omaha market the Secretary made the following finding as to business getting and maintenance expense (*Tagg* Record, p. 34):

A sharp point of controversy between the producers' representatives who testified at the hearing and the

Not only was the method similar at the two markets, but so were the facts. The average expenditures of all firms for business getting and maintaining at Kansas City amounted to approximately

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respondents revolved around certain forms of advertising, especially the practice of the respondents of sending to patrons free subscriptions to the market paper. No attempt is made to decide what business-getting methods the respondents should employ or what proportion of their expenditure for this purpose they should devote to any method. The question is approached with the view of determining what is a reasonable amount to expend for business getting.

An analysis of the expenditures for business getting of the various groups gives the following result:

Group	Lowest percentage of gross commissions spent for business getting	Highest percentage of gross commissions spent for business getting	Average percentage of gross commissions spent for business getting
	Percent	*Percent*	*Percent*
A	11.96	29.99	17.56
B	9.57	16.51	12.96
C	4.27	22.81	14.31
D	4.51	28.73	12.16
E	1.95	26.48	11.60
Average for all respondents			14.85

The expenditures from which the above percentages were calculated do not include solicitors' salaries, which have been accounted for elsewhere. Considering the amounts actually spent for business getting as shown above, the attitude of the producers of livestock toward the expenditures for this purpose, and in view of the fact that a very substantial part of the expenditure does not result in bringing new business to the market, but in shifting consignments from one commission man to another, and because of the fact that the stockyards company also undergoes expenditures for advertising, all of which whether made by commission men or stockyards companies must ultimately be borne by the producers of livestock, 10% of gross commissions received is a reasonable expenditure for business getting.

15% of gross commissions—substantially the same percentage as at Omaha. At Kansas City the expenditure for individual firms varied from 0.98% to 46.51%. (See Appendix B, *infra*, pp. 189–90.) The testimony disclosed that these expenditures were excessive. In the light of that situation it was necessary for the Secretary to make a thorough investigation of all such expenditures and to determine upon a reasonable allowance to be covered in costs for this item.

Appellants have not attempted to demonstrate that the business of any individual firm requires the expenditure of an amount in excess of the amount allowed by the Secretary for business getting and maintenance. In fact, they do not attempt to show that the exigencies of any particular agency require any expenditure for such purpose. They content themselves with pointing out that the aggregate actual non-salary business getting and maintaining expense for all firms was $136,538.09 greater than the amount which the Secretary's allowance would have produced for this item (appellants' brief, p. 140). No effort is made to explain why 11 firms actually spent less than the amount found reasonable by the Secretary for business getting and maintenance incident to cattle and calves, 13 firms spent less for business getting and maintenance incident to hogs, and 3 firms spent less for business getting and maintenance incident

to sheep.[39] Appellants make no contention that these firms are not conducting a successful and efficient commission business by keeping their business getting and maintaining expenses below the reasonable figure as found by the Secretary.

It is apparent from appellants' discussion of business getting and maintenance costs that they are again contending that the Secretary is bound to maintain the *status quo* and fix rates sufficiently high to cover all costs actually incurred. The Secretary, however, has never contended that the schedule of rates is sufficient to do this.

As pointed out (*infra*, pp. 136–138), competition between market agencies is for the most part competition between a relatively fixed number of agencies each seeking to acquire a larger share of a declining volume of livestock. Consequently, the commission firms feel that it is not only necessary to keep their names before the public but to solicit producers and offer additional inducements to shippers in order to secure the business of the shippers.

There are a number of different methods employed by the commission firms in endeavoring to keep their names before the public. Practically all of the firms keep lists of customers and pro-

[39] These figures are computed by comparing the per head allowance of 4.5 cents for cattle and calves, 1.8 cents for hogs, and 0.59 cents for sheep (R. 122) with the actual per head expenditure for each species in 1931 (R. 104–109).

spective customers to whom they send market letters periodically concerning general market conditions and containing reports of outstanding sales consummated by the issuing firm (R. 221, 313, 548). A certain amount of advertising is done in livestock journals and in local papers in the territory from which the firms are accustomed to receive livestock (R. 1089). Also the various salesmen handling livestock at the market carry on a considerable volume of correspondence with their customers (R. 733). While the rules of the Livestock Exchange prevent giving expensive gifts, the market agencies are allowed to distribute inexpensive advertising novelties such as pencils and memorandum books (R. 270).

But the bulk of the expense involved in business getting and maintaining is the result of solicitation work of one type or another. Practically all of the commission men admitted that they did some country soliciting and some of them made regular trips over territory reaching as far west as Arizona, New Mexico, Colorado, Utah, and even California (R. 238, 460–461). Likewise, these men attend conventions and meetings of livestock producers, etc., throughout many of these states (R. 238). Furthermore, when solicitation does not take the form of going out and asking for business, it takes the form of special services rendered by commission men for the purpose of inducing producers to market their livestock through a particular firm.

Appellants have directed the Court's attention to the value of some of these services such as the inspection and appraisal of livestock prior to shipment to market by salesmen from the various firms seeking to handle the business. Conceding that this service may be of some value to producers receiving it, that fact does not justify covering the expense into the rates charged all producers regardless of whether they desire or receive the service.

There are certain other services that are obviously useful to only a small portion of the shipping public. For instance, some of the larger producers in the southwestern territory make a practice of shipping their stock into the grazing region of Oklahoma and Kansas and holding it there before marketing it. Frequently all the arrangements for acquiring pasturage for the stock are made by one of the commission firms (R. 298–299). Other shippers send their stock to feed yards adjacent to the market and hold it there while waiting a favorable market. It is not unusual for the commission firms to arrange for the care of that stock without direct charge to the shipper (R. 295).

Except for services rendered in connection with financing producers, no special charge is made for any of these services.

The Secretary, in considering the item of business getting and maintaining, discussed in great detail in his order all the activities carried on by

the various firms (Pars. 89–104, R. 73–79). All of the expenses involved in maintaining these services and doing the soliciting were included by the Government accountants under the heading of business getting and maintaining except the salaries of salesmen and owners who performed these services (R. 375–376, Gov. Ex. 115, p. 24) . The expenses now under consideration are non-salary expenses, and the necessary salary expense is included in salesmen's salaries, owners' return, etc. (Par. 115, R. 83–84).

The actual non-salary business getting and maintaining expenses for all market agencies amounted in 1931 to 15.22% of their gross commissions, less commissions on "seconds" [40] (Gov. Ex. 115, p. 31). From an analysis of such actual expenses for the individual firms (see Appendix B, *infra,* p. 189), it is apparent that the various market agencies differ widely in their opinions as to the necessity for expenditures for this purpose. It is also obvious that the size of the firm does not determine the percentage of commissions to be spent for business getting and maintaining.

Of the six commission firms receiving gross commissions in excess of $85,000 for 1931, the percent

[40] "Seconds" are animals purchased at the stockyards by traders and placed with commission firms to be resold without moving them from the stockyards. The acquisition of this class of business does not require business getting effort. Therefore, commissions on this class of business have been eliminated from gross revenue for the purpose of this comparison.

of revenues spent for business getting and maintaining was as follows:

National Livestock Com. Co	12.99
John Clay & Co	17.17
Swift & Henry Com. Co	14.86
Martin, Blomquist & Lee Com. Co	23.16
Producers Com. Assn	24.50
Farmers Union Livestock Assn	9.23

A cross-section of the firms receiving gross commissions in excess of $20,000 and less than $85,000 shows a varying percentage of gross commissions spent for business getting and maintaining as follows:

Ragland Storts & Burrus Com. Co	22.32
Crider Bros. Com. Co	13.28
Haggarty, Wilson Com. Co	11.17
Bowles Livestock Com. Co	16.55
Harry Kennaley Com. Co	10.52
Robinson, Hoover Com. Co	6.10
Laird Bros. Com. Co	29.00
Moffett Com. Co	6.72
Witherspoon Livestock Com. Co	20.27
Poole, Dempsey, Rutherford Com. Co	8.34
Baucus & Co	11.28
Cassidy Southwestern Com. Co	12.37

Among the smaller firms, that is, those receiving gross commissions of less than $20,000, the amount spent for business getting and maintaining varied from 0.98% of the gross commissions for Greer & Company to 46.51% for Ira Kimmons Com. Company. Fourteen of these firms had an expenditure of less than 10%.[41]

The testimony of the commission men in no way tended to show that an allowance in excess of that made by the Secretary was necessary or desirable.

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[41] All the foregoing percentages have been computed in relation to gross revenue less commissions on seconds. The reason for this is stated in footnote 40, *supra*, page 128.

Mr. C. A. Stuart, a member of the firm of Stuart, Gillespie and Company, testified that on the basis of the analysis of expenditures as shown in the audit of his firm, he considered that 2.8% of his gross revenues from commissions would represent his out-of-pocket soliciting expenses for 1931 (R. 1056).

Mr. W. T. Angle, of the Producers Commission Association, testified as follows:

> In budgeting our expense for business-getting and maintaining we have given consideration to the approximate amount of money that we want to spend for market cards and other forms of printed contact with our trade and then we have given consideration to the amount of money that we expect to expend on travel, hotel, meals, automobiles, train costs and such as that. We have not endeavored to assess against business-getting and maintaining any definite part of these men's salaries (salesmen who go into the country) in setting up our budget. We do not plan for the cost of business-getting and maintaining to exceed $2.00 a car. In fact we are trying to hold it down around $1.50 on all species. I am speaking of those figures on the basis of the gross number of cars handled and the income straight across on all business and when I say that amount per car I mean on all our business with truck-ins reduced to a car basis. [R. 883–884.]

At pages 1, 2, and 3 of Government Exhibit 115 the total costs per car are shown to be $18.69 as to

cattle and calves, $16.13 as to hogs, and $20.56 per car as to sheep. $2.00 per car, which is the maximum amount which this witness testified that his firm planned to expend for advertising, irrespective of species, is 10.7% of the per car cost as to cattle and calves, 12.4% of the per car cost as to hogs, and 9.7% of the per car cost as to sheep. The witness stated that he was trying to hold down his advertising to $1.50 per car on all species. $1.50 per car related to the costs shown above for handling each of the respective species results in 8.03% as to cattle and calves, 9.30% as to hogs, and 7.30% as to sheep. These percentages of the cost of handling the various species of livestock represent the judgment of the manager of one of the large market agencies doing business on the market as to what is a proper amount of costs to be expended for business getting and maintaining, and they strongly support the Secretary's finding.

Appellants contend that it is improper to consider as business getting and maintaining expenses the expense of trips to the country (appellants' brief, page 144).

Although a substantial portion of the total expense listed under business getting and maintaining was attributable to country trips, which are not advertising in the usual sense, yet neither are country trips directly connected with the actual selling of livestock, which is the primary function of the

commission firms on the market. Undoubtedly the producers receiving advice and assistance from commission men on these country trips sometimes derive benefit therefrom, but the fact remains that practically every item of expense thus incurred by the commission men is incurred for the purpose of inducing a particular shipper to give his business to a particular firm.

To call such expense items "selling services" merely tends to cloud the issue. Such services may aid producers in marketing their livestock but it would also aid the producer if the commission firm would furnish free of charge the feed necessary to fatten the livestock. Absurd as this may sound, it only goes one step farther than securing pasture and looking after stock while it is being finally conditioned for market. For the commission firms to bear the expense of such service may result in a saving of time and expense to the individual producer who receives the benefit but that does not prove that the firms are justified in recouping the expense from other ratepayers who do not use or need these extra services.

These heavy expenditures to attract and keep business are not shown to produce efficient results. Thus Mr. J. W. Murphy of the Bowles Livestock Commission Company testified:

> One day we got a wire from a party asking me to meet him at a point in Kansas. He also wanted to make a loan of $150,000 on

> 2,500 head of steers. We got in touch with the people that could handle this loan and wired him we could make the loan arrangement and that I would meet him in Kansas. He came up there in his car and I met him. We drove for three days looking at different pastures. About 10 days or two weeks later I met him at Wichita and we drove another three or four days and then made arrangements for pasturing the cattle. *We were in hopes that we would get those cattle to sell when they came back this fall. That is what pasture arrangements are generally made for.* We do not charge them anything for that kind of service except that we naturally expect those cattle back on the Kansas City market. I spent a week or ten days working with this party and Mr. Bowles spent a week. Eventually we get a little less than one-third of those cattle. We have had probably eight or ten such deals as that. No charge is made for that work. The man who is seeking the pasture does not reimburse us for our expenses. [R. 317.] [Italics supplied.]

Another example is found in the testimony of Mr. Frank Witherspoon of the Witherspoon Livestock Commission Company:

> A short time ago Mr. Ross of Fort Worth, Texas, asked me to come to Fort Worth and when I arrived there he told me that he wanted Mr. Sanders, our fat steer salesman, and myself to handle the marketing of 1,700 cattle and Mr. Ross asked us to go to the

> Flint Hills country and look at these cattle several times. After we had spent considerable money servicing that particular string of cattle he decided to put them on a feeding contract in Illinois, so we were out that expense with no return. Just this last week I was called to go to Nebraska to place some cattle on a feeding contract for the E. B. Johnson and Sons estate and those cattle were placed in what I would call the Omaha territory. I feel that there will be practically no return. I could go on and give a good many concrete cases in all these lines that in my opinion were not so general in their requirements when the other case was heard. [R. 916–917.]

In each of the above instances the producer received a valuable service from the commission firm rendering the service. The commission firm bore the expense but it did so by including the expense of servicing the livestock which it *did not sell* for the producer in the expense of handling the livestock which it *did sell,* and which was shipped by other producers. The result is that some producers paid for service which they did not get. Certainly this service was not rendered from purely philanthropic motives and if the motive was expectation of future business from the producer benefited, that in itself indicates, first, that such service is no direct part of selling, and, second, that this is in reality an advertising expense.

The only way in which appellants can justify such expenses is to show that such expenditures increase the volume of business to such an extent that they do not increase the reasonable unit costs for handling other livestock. In that case there would be no reason for making an extra allowance in rates to cover such costs, as such costs would tend to pay for themselves in additional returns.

Mr. Bachmann, an accountant from the Department of Agriculture, stated:

> I believe that the effort and expense involved in going after business in the case of these collective agencies are justified only in the event that it may be proven that the result was to produce business which actually produced profits sufficient in aggregate amount to compensate for the expense of getting it. No expense is worth the making of it, if it does not produce at least its equivalent in income. [R. 861.]

In this opinion he was substantiated by the testimony of Mr. J. C. Swift of Swift & Henry Livestock Commission Company:

> The additional business should more than pay for the cost of advertising, if it is good business, particularly if you are going into a territory that is normally yours. [R. 524.]

But in spite of the fact that all principles of business management require that this expense be a self-liquidating expense, it is not. The record

discloses that the volume of business for the whole Kansas City market has been declining since 1929.[42] At the same time the individual commission firms have been increasing their efforts to get and maintain business. As stated by Mr. J. W. Murphy; of the Bowles Livestock Commission Company:

> The tougher the going gets, the harder a fellow will go after the business, and while our cash outlay for advertising may be more or less last year than it was the year before, we are giving more time to it both directly and indirectly and through personal correspondence. With less volume we might have a little more time to devote to that angle of the business, but regardless of that, if we are going to stay in, we have got to go after it. I have made more country trips this season. We have spent more time on it, under greater difficulties, than in past seasons. [R. 774.]

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[42] The following table shows the number of head of each species of livestock bought and sold by the Kansas City market agencies in 1929 and 1931:

Species	Number of head, 1929	Number of head, 1931
Cattle and calves	2,844,815	2,489,772
Hogs	2,487,591	1,289,623
Sheep	1,953,438	2,028,026

(The figures in this table are compiled from Gov. Ex. 15, pp. 84, 98, 104; and Gov. Ex. 115, p. 57, and include the volume handled by the two cooperative firms.)

The result is that year after year practically the same number of firms are spending more money to get and maintain what they consider their share of a total market volume that is decreasing instead of increasing. Consequently, the total unit cost for business getting and maintaining is increasing regardless of the success or lack of success which certain individual firms may have in increasing their volume. This all follows from the fact that a great deal of the service rendered has no influence on the shipper in determining to which livestock market he will ship his stock.

In the last analysis it is not the special inducements offered by the commission firms but market price and market service that determine which firm will get the business (R. 456, 604).

Mr. John Haren, a salesman for John Clay & Company, testified:

> The chief factors that influence a shipper to ship to Kansas City rather than to some of the other markets is the condition of the market and his information as to where he can get the best price for his livestock. [R. 470.]

Mr. Frank Standish of Drumm Standish Commission Company stated:

> The first thing that induces a shipper to ship to any particular market or commission firm is that he naturally feels like he is going to get as much or more out of his shipment by going to this particular firm

> than at any other place. The second reason is that he knows this person or this firm and likes them because they know how to handle the business, and he knows them to be upright and on the square. A neighbor who has shipped cattle is well satisfied and he may recommend a firm. Perhaps more than most any other business it is largely a personal proposition. [R. 607.]

From the foregoing discussion it is apparent that the item of business getting and maintaining is a competitive item of expense developed between the commission firms in their efforts to increase their individual shares of a fairly fixed volume of business (R. 613–614). These firms have all been operating under a uniform schedule of rates. Each one holds its services out as being of the highest quality. If such claims be justified, it can make but very little difference to shippers which market agency they utilize. Consequently, the intense competition between firms can only manifest itself in the form of offering special inducements to shippers to persuade them to select a particular firm. It is immaterial whether we speak of these inducements as "selling service" or "bonuses," the fact remains that they are not directly necessary in performing the function of selling livestock, and that they are the direct result of excessive competition.

Mr. C. A. Stuart, a member of one of the commission firms, in discussing appraisal work, said:

> If some firms are more active along this line it makes it necessary for other firms to become more active, to an extent. Within recent years and within recent months my firm has been reaching out more extensively for business. It has gone into new territory. This is not peculiar to any particular locality. [R. 1058.]

Mr. Bryant Poole, of the firm of Poole-Dempsey-Rutherford Commission Company, testified:

> If our firm should curtail the amount of this appraisal work and the other firms continue to do it, it would cripple us a lot, because the firms would go out and appraise for them and they would ship to the other firms. It is necessary for us to do it as long as anybody does it. [R. 1084.]

Mr. F. E. Mollin, of the American National Livestock Association, testified:

> There is a great deal of money that is now spent in the solicitation of business that is not for the purpose of attracting new business to the market, but simply one firm trying to get it away from another firm. That does not do the livestock industry any good. If there is no limit on the amount that can be spent in that way, except the money that they can make through commission, there is the constant urge to have higher commission charges. *As I have observed it, the only result of higher commission charges has been more firms in business.* Conversely, it seems to me that if you have a

> less return from commission there has got to be some restriction of the amount that they can spend in advertising and business solicitation. The natural result of that, unfortunate as it seems, locally, will be that some firms would have to retire from business. [R. 251.] [Italics supplied.]

The competitive nature of this item results in a great amount of duplication of service. It is not unusual for several different firms to appraise the same livestock for a single shipper (R. 252, 470, 878, 932, 1058). Obviously there must be a large duplication in the sending out of market letters because nearly all firms follow this practice. One firm sent out eleven hundred letters each week and had sent out as many as three thousand in a week (R. 313). The whole market territory is covered by solicitors for the stockyards company (R. 263) as well as the solicitors from the commission firms. The Bureau of Agricultural Economics in the Department of Agriculture maintains a daily radio broadcasting schedule of market reports at Kansas City in addition to the Exchange broadcast (R. 282–283). The dissemination of the same information by the market agencies is an unnecessary duplication of service, is of no value to the livestock industry, and results in a great deal of waste which eventually must be paid for by the shippers.

Mr. Bachmann testified:

> To the extent that business getting and maintaining efforts of market agencies at

> the Kansas City stockyards merely tends to divert the volume from one firm to another, those expenditures increase the cost of marketing. [R. 878.]

Furthermore, the shippers are feeling the weight of this expense as it is reflected in the rates charged by commission men. Mr. F. E. Mollin further testified:

> The livestock industry today is in the dumps and cattle are losing money. We should pay only a fair and reasonable charge for service. It is pretty hard to say just what the immediate effect on the industry would be but it is the total effect of all the charges that go into it. If you say one little charge is not of any effect and there is another, the grand total makes a considerable difference. We think that the nature of your business here has been such that it has attracted more men than are needed to conduct the service and that makes it tough for all of you. I think the only practical way to regulate the number involved in the business is through establishing reasonable rates based on good service and efficiently operated firms. [R. 248–249.]

The foregoing testimony is a sufficient answer to appellants' contention (appellants' brief, pp. 21–23, 144) that they are spending large amounts on country trips primarily for the benefit of producers. This contention is not new in market agency rate cases. It has been made in other suits brought

to enjoin such rate orders of the Secretary and it has been rejected by district courts. Thus, in *American Commission Co.* v. *United States,* 11 F. Supp. 965, the District Court of Colorado said (p. 972):

> Several stockmen testified that they did not desire assistance in the sorting and grading of their cattle, and that they favored the complete elimination of any allowance for "Business Getting and Maintaining." At least one livestock organization has passed resolutions requesting that this country solicitation cease, and the resulting savings be used to reduce rates.
>
> In the final analysis the various expenditures considered under this head are incurred mostly to persuade a shipper to send his livestock to one firm rather than another, which presumably can serve him equally well, and not in the development of new territory; so it is hard to see what real benefit it all is to producers and shippers. There is substantial evidence on this record to support the Secretary's finding that 10 per cent. is a reasonable allowance for this item in computing his schedule.

The market agencies, like other businesses, are entitled to make reasonable expenditures for advertising, but producers should not be forced to pay more than a reasonable amount for having themselves solicited. The service rendered may be valuable to some producers but it does not follow that every producer should pay for that serv-

ice regardless of whether he uses or desires to use the service. Furthermore, these services are chiefly performed in connection with rail shipments of cattle and are not often furnished to small producers (R. 833). But if all this expense is covered into rates, it means that all producers are forced to bear the burden of the expense.

The Secretary has recognized that some expense along this line is necessary in order to operate an active business of this nature. It is necessary for a commission firm to keep its name before the public and keep in contact with conditions in the field to a certain extent. The Secretary's analysis and finding are stated in paragraph 148 of his order (R. 109–110):

> An amount reasonably necessary for business maintenance is an item properly coverable into a schedule of reasonable rates. Any expenditure above this amount directed toward increasing the volume of business should be recouped from the additional business obtained. Competition in the commission business is extremely keen and results in a race for getting business which does not manifest itself in a reduction of rates but consists largely in efforts by each market agency to take some of the business away from the other market agencies. Since the rates of most of the respondents are uniform, there is little inducement for the shipper to select one market agency in pref-

erence to another because of the rates charged. Business is attached in many cases by reason of ties of personal friendship; in other cases by the estimate of the character of services rendered. Each market agency holds its services out to be of the highest quality and endeavors to convince the shipper of this fact. Under these conditions the amount expended for business getting and maintaining is limited only by what can be afforded under the existing rates, whatever they may be, and by such limits as the respondents impose upon themselves. If excessive expenditures on this account be covered into a rate schedule, every shipper pays to have himself persuaded to send his livestock to one commission firm rather than to another which presumably can serve him equally well. Moreover, as already pointed out, some of the expenditures incurred to get and hold business are covered in general expenditures and in the salaries of salesmen employed, in part at least, on account of the business which they control as well as on account of the salesmanship which they perform. On the basis of all the facts in the record it is found that the reasonable amount to be covered into rates and paid by the shipper on account of business getting and maintaining should not exceed 10 percent of the total reasonable cost and reasonable profit.

Although many firms were spending more for business getting and maintaining than the Secre-

tary actually included in rates for this item, the following table indicates that some firms were not spending as much for this item as was allowed by the Secretary (Gov. Ex. 115, pp. 24, 57):

Firm number	Actual expenditures for business getting and maintaining	Total allowance under Secretary's order for all species	Firm number	Actual expenditures for business getting and maintaining	Total allowance under Secretary's order for all species
1	$502.00	$255.32	52	$1,998.90	$1,113.07
4	4,772.57	1,792.46	53	4,805.07	1,627.18
5	4,060.13	1,234.33	54	26,237.17	12,314.31
6	1,344.83	867.07	55	4,517.32	3,153.91
7	1,948.84	1,457.81	56 [1]	1,409.01	1,709.10
9 [1]	245.56	486.53	59	18,037.98	9,900.77
11 [1]		139.36	60	1,460.13	1,249.62
12	7,183.35	3,584.29	61 [1]	579.79	662.96
13	6,094.41	3,645.77	62	6,641.65	1,721.92
14	4,182.98	2,438.42	63	23,667.58	8,770.12
15 [1]	577.47	1,070.35	65 [1]	1,639.74	1,963.66
16	1,607.82	1,362.50	66 [1]	45.00	179.46
17	715.00	638.28	67 [1]	61.37	132.12
18	4,041.75	2,888.20	70	4,886.72	2,013.61
19	1,403.48	653.99	71	5,388.71	3,165.86
20	2,632.16	1,526.63	72 [1]	69.48	127.52
23	2,153.82	1,605.13	73	9,995.11	4,199.00
25	4,556.60	2,766.35	74	746.31	438.26
26	2,590.31	1,748.69	75	1,826.78	1,237.17
29	1,418.49	1,382.62	76 [1]	77.71	597.33
30	1,466.80	1,120.56	77	1,779.35	1,247.72
33	137.78	101.72	78	850.00	592.39
34	4,100.12	2,644.87	79	720.48	578.05
35	9,166.57	3,250.73	82	10,298.78	5,524.47
37 [1]	53.62	98.01	83	8,429.48	5,582.26
42	8,184.78	3,251.71	84	6,416.29	4,144.06
43	4,543.31	828.84	87	976.65	623.93
44	5,554.83	1,577.61	88	852.00	134.84
46	11,388.03	7,732.96	10	24,809.83	7,677.45
48	2,252.16	2,015.83	36	9,149.26	6,750.69
51	5,503.18	3,918.55			

[1] Firms which spent less for business getting and maintaining in 1931 than the amount found reasonable by the Secretary.

Appellants throughout their discussion of the Secretary's finding that 10% was a reasonable allowance for business getting and maintenance have

attempted to leave the impression that there was something arbitrary or unreasonable in the selection of that figure. It is quite apparent that it would be impossible to find any lump sum which every agency might be said to be reasonably required to spend for this item. The variation in the size of the market agencies and their volume of receipts precludes any such method. Likewise, this is the type of expenditure which should be so closely related to the volume of business handled that a scientific method of budgeting expenditures would require that this expense be fixed as a percentage of either revenue or costs. Since the market agencies themselves do not appear to have worked out any such method of budgeting their business getting and maintenance expense, it was necessary for the Secretary to determine a proper relation between this item and the other cost items. The fact that he exercised his judgment in the light of the evidence and found that the reasonable relation of business getting and maintenance costs to other costs and profits should be 10% does not prove that that determination was arbitrary. In *American Commission Co.* v. *United States,* 11 F. Supp. 965, the court stated (p. 971):

> An allowance for this item, like an allowance for going concern value, is peculiarly a matter for the informed judgment of the trier of the facts. Both rest largely upon intangible elements which can not accurately be measured.

It was apparent from the evidence that the allowance was more than sufficient to cover the actual costs of a number of the market agencies. The mere fact that the Secretary did not select a figure below or above 10% does not invalidate the selection of 10%.

It should be noted in this connection that the 10% allowance is not the only allowance for business getting and maintaining expenses. No salaries were included in this item but the Secretary, in making the salary allowances, contemplated that those allowances would cover work done in business getting and maintaining (Par. 115, R. 83–84).

Furthermore, the rates were finally fixed at a level which provided a cushion of $150,212.91 over reasonable costs. Since no attempt has been made to limit the expenditures for business getting and maintaining, this amount, as well as any amounts resulting from economies in other expense items, is available for solicitation work. Also, the commission firms may make unlimited expenditures for business getting and maintaining if those expenditures are self-liquidating.

Appellants have pointed out in their brief (appellants' brief, p. 142) that the actual expenditure for business getting and maintaining may be divided up into 45% for country trips, 8% for exchange dues and assessments, and that the remaining 47% is mostly chargeable to market letters. The burden of appellants' complaint seems to be

that the Secretary did not set out in detail which class of expenses he expected appellants to reduce or eliminate. Obviously the Secretary should not determine such details of individual management. From the foregoing discussion, *supra,* pages 128–129, it is apparent that the appellants themselves follow no uniform practice in getting and maintaining business, nor do they show any degree of uniformity in the amounts which they expend for this purpose. Unless appellants can demonstrate, in the face of the uncontroverted evidence that some of the firms are spending less than the amount allowed, that it is necessary to spend a greater percentage than that found reasonable by the Secretary, it would seem apparent that all could get along satisfactorily on the Secretary's allowance. The details of accomplishing this must necessarily be left to the judgment of the owner of each market agency and the exigencies of each business.

Undoubtedly it is true that the allowance is not sufficient to protect all appellants against all of the hazards of competition. But the law does not require that rates cover more expense than that for which the Secretary has allowed.

The Secretary has clearly recognized that "within the limits of reason, advertising or development expenses to foster normal growth are legitimate charges upon income for rate purposes as for

others" *West Ohio Gas Co.* v. *Public Utilities Commission of Ohio,* 294 U. S. 63, 72. Appellants are entitled to have covered into rates a reasonable amount to spend in calling attention to the quality of their services to patrons. If they spend more than a reasonable amount in their efforts to attract new business, the expense incident to obtaining this new business should be financed out of the commissions derived from it. If petitioners spend more than a reasonable amount for business getting and maintaining and fail to get additional volume, the shipper should not be forced to subsidize this non-self-liquidating expenditure.

The allowance made by the Secretary is in line with similar allowances made at other markets and approved by the courts. In *Tagg Bros. & Moorhead* v. *United States,* 29 F. (2d) 750, 280 U. S. 420, the District Court found that an allowance of 10% of gross revenue was reasonable, and that finding was sustained by this Court.

In *Acker* v. *United States,* 12 F. Supp. 776, the District Court sustained an allowance of 9% of reasonable costs and profits for business getting and maintaining and in *American Commission Co.* v. *United States,* 11 F. Supp. 965, an allowance of 10% of reasonable costs and profits was found to be reasonable.

It is submitted that the Secretary's findings with respect to the reasonable amount to be

covered into rates for business getting and maintaining expenses are reasonable, lawful, and supported by substantial evidence.

C. THE EVIDENCE FULLY SUPPORTS THE SECRETARY'S FINDINGS AS TO THE COSTS WHICH THE CONDITIONS OF THE BUSINESS TEND TO KEEP DOWN

The findings of the Secretary with respect to reasonable costs, other than those which have been considered above, relate to those costs which the conditions of the business tend to keep down.[43] Of these findings the only ones to which appellants object in their brief are the findings with respect to yarding and office salary costs.

1. *The Secretary's Allowances for Yarding and Office Salary Costs are Fully Supported by the Evidence*

Appellants' objection to these findings of the Secretary is not directed primarily at the amounts which he found to be reasonable unit costs for yarding and office salaries. Appellants do not expressly contend either that those amounts in themselves are unreasonable or that they fail to cover the costs actually incurred by a great many of the market agencies in the Kansas City market. The record makes such contentions impossible.

The following table compares the Secretary's findings as to the reasonable unit costs of yarding

[43] These costs are: yarding salaries, yarding expenses, office salaries, office expenses, administrative and general expenses, insurance, and interest (R. 122).

salaries with the weighted average unit costs actually incurred by appellants for those functions:

	Reasonable Unit Costs (R. 122)	Weighted Average Of Unit Costs Actually Incurred (Gov. Ex. 115, 115B)
Cattle and calves	$0.0750 per head	$0.0704 per head.
Sheep	$0.0080 per head	$0.0057 per head.
Hogs	$0.0300 per head	$0.0369 per head.

The actual unit cost of yarding salaries in 1931 to 56 market agencies operating in the Kansas City market are shown in paragraph 44 of the Secretary's findings (R. 98). Thirty-five of the 56 firms had lower actual per head costs for cattle and calves than the allowance fixed by the Secretary. Twenty-five out of 51 market agencies had unit costs for yarding salaries with respect to hogs which were lower than the allowance fixed by the Secretary, and the unit cost incurred by one firm was the same as that allowed by the Secretary. As to sheep, 6 out of 12 firms had lower costs than the allowance made by the Secretary.

If the allowances made by the Secretary for reasonable unit costs for yarding salaries are applied against the aggregate volume of livestock of all species handled by the market agencies in 1931, it appears that these allowances would have produced a revenue more than $11,000 in excess of appellants' aggregate out-of-pocket expenses for yarding salaries. (See table on page 163, *infra*.)

The following table compares the Secretary's findings as to the reasonable unit costs of office salaries with the weighted average unit costs actually incurred by appellants for those functions:

	Reasonable Unit Costs (R. 102)	Weighted Average Of Unit Costs Actually Incurred (Gov. Ex. 115, 115B)
Cattle and calves	$0.0525 per head	$0.0480 per head.
Sheep	$0.0100 per head	$0.0081 per head.
Hogs	$0.0300 per head	$0.0278 per head.

The actual per head cost of the market agencies for office salaries is shown in paragraph 146 of the Secretary's order (R. 100–102). Twenty-five out of 57 firms had a lower per head cost for cattle and calves than the amount found reasonable by the Secretary; 27 out of 57 had a lower actual cost for hogs, and 12 out of 60 had a lower actual cost for sheep.

When the Secretary's reasonable unit costs for office salaries are applied against the aggregate volume of livestock of all species handled by the market agencies in 1931, it appears that the reasonable costs would have produced a revenue exceeding by more than $17,000 appellants' actual out-of-pocket expenses for office salaries.

Appellants do not attempt, in the face of this evidence, to contend that the Secretary's findings as to the reasonable unit costs of yarding salaries and office salaries are unreasonably low. Their ob-

jection, which is leveled primarily at the Secretary's findings as to actual unit costs incurred by appellants, is this: The functional unit costs found by the Secretary to have been actually incurred for yarding and office salaries and set forth in his findings "are wholly at variance with the costs as ascertained and reported by the Government's accountants" (appellants' brief, p. 149). Appellants do not assert that this circumstance caused the Secretary's findings of reasonable costs to be lower than they otherwise would have been nor are they otherwise explicit as to the exact way in which this alleged variance has prejudiced them.

The asserted variance does not affect in any way the validity of the Secretary's findings as to reasonable costs. The issue as to those findings is whether there is evidence to support them, and appellants' preference for one accounting method rather than another has no pertinence to that issue.

There is no basis whatsoever for appellants' assertion (appellants' brief, p. 157):

> The ultimate findings of the Secretary as to reasonable costs for yarding and office salaries are not supported by any evidence other than the Secretary's evidentiary findings. It has been shown that the evidentiary findings are themselves no more than arbitrary and unsupported figures, completely without probative value.

If the Secretary had made no findings as to the actual unit costs incurred by market agencies for yarding and office salaries, the uncontroverted fact that the reasonable costs found by the Secretary as applied to the volume of livestock handled in 1931 would have produced an amount in excess of appellants' actual out-of-pocket expenses for yarding and office salaries, standing alone, would have been more than sufficient to support the Secretary's findings as to reasonable costs.

But quite apart from this consideration, the Secretary's findings as to actual costs are not "arbitrary and unsupported figures." On the contrary, they are based on exhibits and facts which are in the record, including the costs analyses made by the Government accountants. The difference between the cost figures found by the Secretary and the results reached by the Government's accountants is capable of an easy and perfectly comprehensible explanation. The difference is the result of the following situation: In connection with their analysis of actual costs, the Government accountants had each market agency fill out a questionnaire which showed, among other things, the number of employees, their principal duties, their compensation, and the amount of time which each spent on different functions (Record 846, 807, 872; Gov. Ex. 115B). On the basis of the information contained in these questionnaires the accountants, in making their analysis of costs, attempted to divide the time

of each employee and to charge an estimated portion of his time to each function (R. 855). For example, if the questionnaire indicated that a certain salesman devoted one-fourth of his time to yarding, the accountants, in determining the total cost of yarding salaries, included in that total one-fourth of the salesman's salary."

When the Secretary prepared to determine the actual unit costs incurred by the market agencies he did not adopt the accountants' method of dividing the time of employees among several functions, but instead charged all of each employee's salary to the single function to which most of the employee's time had been devoted. For example, in the hypothetical instance mentioned above, the Secretary corrected the accountants' cost analysis by restoring to the function of salesmanship the one-fourth of the salesman's salary which had been charged to yarding by the accountants and deducted an equal amount from the total of the yarding salaries.[15] In each of the instances which appellants have set forth in pages 150–152 of their brief, such adjustments explain the difference between the costs set forth in the order and the costs set up in the cost analysis prepared by the Gov-

[14] The information from which this analysis was made of the costs of each firm is contained in Government Exhibit 115 B.

[15] Government Exhibit 115B contains the information which the Secretary used in making these corrections of the results reached by the Government accountants.

ernment accountants. Appendix C to this brief (pp. 191–192, *infra*) shows the amount of the adjustments in the case of 15 of the firms which are listed in the table in appellants' brief and indicates the reason for making each such adjustment. A similar explanation could be made for each of the instances listed in that table. An examination of Appendix C shows that there is nothing mysterious or "unexplained," or "arbitrary" or "capricious" about the Secretary's method of determining the costs which he set forth in his order.

The Secretary clearly explained in paragraph 115 of his order why he used this method of determining costs rather than the method employed by the accountants. He said [46] (R. 83–84):

> * * * in many instances the major functions of those engaged in performing the activities of respondents can be carried on

[46] Appellants for some inexplicable reason appear to believe that this explanation is in conflict with a statement in appellees' answer in the court below which appellants have isolated from its context and set forth on page 149 of their brief. An examination of the paragraph of appellees' answer from which the statement is taken (R. 142) shows that it was directed to an allegation made by appellants in their petitions to the effect that the separation of costs into functional costs such as selling, yarding, office work, etc. was arbitrary and not based on any natural segregation incident to the actual performance of these functions; and that the statement has nothing to do with the question of whether in determining costs an attempt should be made to divide the time of a man among the various functions which he performs.

only at certain times. For instance, a salesman cannot sell livestock except when the market is open and more or less active, notwithstanding the volume of livestock which he has for sale. On the other hand, the type of men who make good salesmen would hardly be content to accept less salaries in consideration of short hours. They demand and get good pay and are willing to return therefor a reasonable day's and week's service. Therefore, the fact that, prior to the selling hours they assist in the yards and that, during the last one or two days of the week they go to the country to appraise livestock and solicit business do not increase the respondents' expenses for salaries. Therefore, in the distribution of costs hereinafter made to functional accounts, the services of a salesman, for instance, are not divided as between selling, yarding, office work and business getting and maintaining, but are considered as being covered by the reasonable allowance for salesmanship. The same is true in principle with respect to the salaries of other workers such as yardmen and those who are engaged in the office.

Appellants' attack is merely a criticism of the accounting method used by the Secretary and that criticism rests on nothing more substantial than that the Government accountants used a different method. The Secretary is obviously not bound to employ a certain accounting method

merely because that method was used by Government accountants in making a cost analysis. The merits of the two accounting methods are not material, but if they were, appellants would have to find a more substantial basis for their attack than the fact that the method used by the Secretary was not also used by his accountants.

In this connection it is interesting to note that appellants' enthusiasm for the accounting method employed by the Government accountants disappears entirely when appellants consider the matter of salesmanship performance. In their computations as to the average performance of the salesmen of different market agencies, appellants do not attempt to divide the salesmen's time among the different functions which they perform and thus make allowance for the time which they spend doing other things besides selling and buying livestock. Had they done so they would have obtained much higher performance figures than the ones they refer to in their brief.

Appellees submit that the difference between the actual costs set forth in the Secretary's order and the cost figures found in the cost analysis made by the Government accountants does not affect in any way the merits of the evidence upon which the Secretary's findings rest or the validity of the findings themselves.

2. *The Evidence Supports the Findings Made by the Secretary with Respect to the Other Costs Which the Conditions of the Business Tend to Keep Down*

Appellants in their brief do not attack the findings made by the Secretary as to the reasonable costs of the remaining functions to which costs were allocated. Consequently, appellees will not deal with these findings in detail but will briefly indicate in a general way the evidence upon which the findings rest.

Yarding expenses—By comparison with the actual per head cost for yarding expenses (Par. 145, R. 99–100) it will be seen that 37 out of 49 firms had a lower actual cost on account of yarding expenses for cattle and calves than the allowance fixed by the Secretary, only one out of 41 had a higher actual cost for hogs; and 16 out of 28 had a lower actual cost for sheep.[47]

[47] There were more firms having costs on account of yarding *salaries* for cattle and calves and hogs than there were firms having costs on account of yarding *expenses* for the same species, because in some instances costs classified as "yarding expenses"—usually nominal—were not incurred at all.

There were more firms having costs on account of yarding *expenses* for sheep than there were firms having costs on account of yarding *salaries* for sheep, because a considerable number of firms specializing in handling other species would, upon receiving a consignment of sheep, have it handled by another firm (usually a sheep commission firm); thus the consignee firm would have no costs of yarding salaries or yarding expenses *directly* allocable to sheep. However, the accountants had to deal with some kind of ex-

Office expenses.—Twenty-five out of 56 agencies had a lower actual per head cost on account of office expenses for cattle and calves than the allowance fixed by the Secretary, 28 out of 56 agencies had a lower actual cost for hogs (one having the same figure), and 9 out of 59 had a lower actual cost for sheep (one having the same figure) (Par. 147, R. 102–104).[48]

Administrative and general expenses—Actual per head costs for administrative and general expenses, including telephone and telegraph, directors' fees, legal and auditing, taxes, mail, clearing house, general and miscellaneous, are set forth in paragraph 149 of the Secretary's order (R. 110–112). Thirty-eight out of 57 firms had lower actual costs than the allowance fixed by the Secretary for cattle and calves and one firm had the same figure;

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penses, such as yard supplies, which could not be directly charged to any species, and were allocated to all species on a basis of number of drafts handled; thus such a consignee firm as has been mentioned might have a functional cost on account of yarding expenses and none on account of yarding salaries.

[48] The fact that there were more firms having functional costs on account of office *salaries* than there were firms having functional costs on account of office *expenses* is due to the practice known as "clearing." Thus, a commission man might do his own selling, but hire all his office service, such as bookkeeping, stationery, etc. from another firm. The amount he paid the latter firm would really be compensation for a number of items other than bookkeeper's salary, but the man so "cleared" would carry that amount on his books as salary cost, and it was not practicable for the accountants to divide it into office salary and office expense.

40 out of 57 had a lower actual cost for hogs; and 14 out of 60 a lower actual cost for sheep and one had the same figure.

Insurance—As set forth in the Secretary's Order (Par. 150–154, R. 115–117), he obtained his allowance to cover premiums paid to carry insurable risks by considering actual quotations applicable to the market as a whole for mortgage and theft insurance (Par. 150, R. 115)—and by accepting the figures compiled by the appellants' own auditor in regard to workmen's compensation insurance (Par. 151, R. 116; Resp. Ex. 235). There was no substantial dispute between the parties as to the amount attributable to fire insurance premiums (Par. 151, R. 116; Resp. Ex. 235; Gov. Ex. 115, p. 27). There was likewise no dispute as to the amount chargeable for bond premiums, which was the actual amount expended by the agencies during the test period (Resp. Ex. 235, Gov. Ex. 115, p. 27). The Secretary did not include in his computations an allowance for public liability insurance, and the record supports this action (R. 532, 535, 536, 985).

Interest—The tables used in fixing the allowance for interest on invested capital are set forth in order, paragraphs 155 to 158 (R. 117–120). Thirty-three agencies out of 55 had a lower actual per head cost on this account for cattle and calves than the allowance made by the Secretary; 35 out of 54 had a lower cost as to hogs; and 34 out of 49 had a lower cost as to sheep.

3. *The Allowances Made by the Secretary for Those Costs Which the Conditions of Business Tend to Keep Down are More Than Sufficient to Cover the Appellants' Actual Expenditures for Those Costs*

The following table shows that if the allowances made by the Secretary to cover the seven functional costs classified by him as costs which the conditions of the business tend to keep down (including yarding and office salaries) are applied to the 1931 volume of business of appellants, they produce more than the actual out of pocket expenses of appellants for those seven functions for 1931, including additional accruals for interest on investment not shown by appellants' books as expenditures and insurance allowances to some firms which did not carry insurance:

Comparison of reasonable costs as found by the secretary with book figures of cost and accruals for seven expense functions of appellants

	Reasonable costs per head [1]	Total reasonable costs
Cattle and calves, total number of head, 2,284,207 [2]		
Yarding salaries	$0.0750	$171,315.53
Yarding expenses	.0140	31,978.90
Office salaries	.0525	119,920.87
Office expenses	.0300	68,526.21
Administrative and general	.0330	75,378.83
Insurance	.0070	15,989.45
Interest on investment	.0150	34,263.11
Total		517,372.90

[1] R. 122, par. 163, of Secretary's Order.

[2] See footnote on p. 163.

Comparison of reasonable costs as found by the secretary, etc.—Con.

	Reasonable costs per head	Total reasonable costs
Hogs, total number of head, 1,045,048 [1]		
Yarding salaries	$0.0300	$31,351.44
Yarding expenses	.0060	6,270.29
Office salaries	.0300	31,351.44
Office expenses	.0175	18,288.34
Administrative and general	.0200	20,900.96
Insurance	.0025	2,612.62
Interest on investment	.0070	7,315.34
Total		118,090.43
Sheep, total number of head, 1,896,608 [1]		
Yarding salaries	.0080	15,172.86
Yarding expenses	.0004	758.64
Office salaries	.0100	18,966.08
Office expenses	.0050	9,483.04
Administrative and general	.0050	9,483.04
Insurance	.0013	2,465.59
Interest on investment	.0040	7,586.43
Total		63,915.68
Grand total		699,379.01

[1] See following table.

Respondent's Exhibit #247:

Cattle and calves sold	1,782,928
Cattle and calves bought	501,279
Total	2,284,207
Hogs sold	956,531
Hogs bought	88,517
Total	1,045,048
Sheep sold	1,743,668
Sheep bought	152,940
Total	1,896,608

It may be objected that the computations shown in the foregoing table are defective because they include both livestock bought and livestock sold, and some expenses in buying such as yarding sala-

	Total reasonable costs	Book expenses and accruals	Reference
Yarding salaries	$217,839.83	$206,394.60	Gov. Ex. 114-1 to 107 Ex. 115B.
Yarding expenses	39,007.83	25,268.45	Gov. Ex. 115, page 23.
Office salaries	170,238.39	154,063.97	Gov. Ex. 114-1 to 107 Ex. 115B.
Office expenses	96,297.59	99,810.19	Gov. Ex. 115, page 25.
Administrative and general	105,762.83	103,292.36	Gov. Ex. 115, page 26.
Insurance	21,067.66	22,265.47	Gov. Ex. 115, page 27.
Interest on investment	49,164.88	43,061.11	(Resp. Ex. 239, less col. h.) (R 118, Fg. 157.)
Total	699,379.01	654,156.17	
Total book expenses and accruals	654,156.17		
Excess of total reasonable costs over book expenses, etc.	45,222.84		

ries and expenses are less than the same class of expenses in selling. There are offsetting factors, however, such as the fact that expenses for interest, per head, are very much greater for buying than for selling (Resp. Ex. 53, Schedule 14E, Sheet 1 of 4). Moreover, the appellants' own accountant has used the same method of computation (Respondents' Ex. 207). The table shows that there can be no serious dispute in the case as to the reasonableness of the Secretary's findings with respect to the costs which the conditions of the business tend to keep down.

D. THE ALLOWANCE MADE BY THE SECRETARY FOR RETURN TO THE OWNERS OF MARKET AGENCIES IS FULLY SUPPORTED BY THE EVIDENCE

The Secretary's allowance for return to the owners of market agencies is found in paragraphs 159–162 of his order (R. 120–121). This allowance, which includes compensation for management and

the carrying of uninsurable risks, is not attacked by appellants in their brief.

Management—In fixing an allowance to be made for management, as distinguished from the carrying of risks and other activities peculiar to an owner rather than a manager, the Secretary adopted the simple, practical, and reasonable method of considering salaries paid on the Kansas City market to men who were hired solely as managers, that is, who were not owners and who were not salesmen. His finding corresponded to the highest figure so ascertained. In the case of an owner who acted as manager, this would not be the limit of such owner's profit but would be merely compensation for the function of management. This allowance does not operate as a limit upon salaries payable to managers, but is merely a unit allowance. *Tagg Bros. & Moorhead* v. *United States,* 280 U. S. 420, 439.

Uninsurable risks—In making an allowance for the carrying of certain classes of risks, such as defective title to livestock, accounting errors, credit losses, etc. as to which insurance was conceivable although not actually obtainable, the Secretary adopted the agencies' own experience (Par. 161, R. 121). As to other classes of uninsurable risks, such as the possibility of loss through economic changes, the Secretary found that "whoever should bear these risks there is no practicable way of appraising them" (Par. 162, R. 121) and

accordingly made his rates higher than was necessary to cover costs and the profit he found reasonable.

VII

The Secretary Made a Legally Sufficient Finding that the Existing Rates Are Unreasonably High

In paragraph 179 of his order the Secretary states (R. 127):

> Upon the basis of the reasonable costs hereinbefore determined and upon a consideration of the entire record, it is found that respondents' schedules of rates and charges now under investigation contain rates and charges which are unreasonable and unjustly discriminatory.

This finding is sufficient on its face to satisfy the requirements of the Packers and Stockyards Act.[49]

Appellants object, however, that the Secretary's finding that the existing rates are unreasonably high is not adequately supported by evidentiary

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[49] Section 310 of the Packers and Stockyards Act provides that "Whenever after full hearing * * * the Secretary *is of the opinion* that any rate, * * * of a stockyard owner or market agency, for or in connection with the furnishing of stockyard services, is or will be unjust, unreasonable, or discriminatory" (italics supplied), he may determine and prescribe what will be the just and reasonable rate or charge to be thereafter observed in such case or the maximum or minimum rate to be charged. It should be noted that the Act does not require findings to be cast in any particular form.

findings.[50] There might be some merit in this objection if the Secretary's ultimate finding as to the unreasonableness of the existing rates stood alone and there was nothing in the order to indicate how or why the Secretary had reached this ultimate result. But that is not the case. The Secretary's order, which occupies 106 pages of the printed record, contains lengthy and detailed findings of fact which fully indicate how and why he reached this conclusion.[51]

The more important evidentiary findings which support the Secretary's ultimate finding that the existing rates are unreasonably high may be briefly summarized as follows:

(1) *The finding as to the amount of the charges in the existing tariff and a finding that, with cer-*

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[50] The District Court in its opinion states (R. 148):

> The Secretary made 162 findings of fact upon the evidence heard at the original hearing and at the rehearing. No contention is made but that these findings support the order. Unquestionably they do support the order and that fully.

[51] The decisions cited by appellants in their attack on the form of the Secretary's finding relate to factual situations which have nothing in common with the instant case. For example, this is not a situation where it is not clear what the order of the Secretary means (cf. *United States* v. *Chicago, M., St. P. & P. R. R. Co.*, 294 U. S. 499, 511); nor one in which the Secretary has failed to make a complete statement of the grounds of his determination (cf. *Beaumont, S. L. & W. Ry.* v. *United States*, 282 U. S. 74, 86); nor one in which the Secretary has failed to find some basic or essential fact required to support his order (cf. *Florida* v. *United States*, 282 U. S. 194, 215).

tain unimportant exceptions, these charges are uniform (R. 63–68).[52]

(2) *Findings as to the abnormal competitive conditions in the Kansas City market which tend to cause costs to be unreasonably high*—These include the Secretary's finding in paragraph 113 of his order that notwithstanding unfavorable business conditions and lower receipts in 1931 as compared with 1929, few of the market agencies showed substantial reductions of personnel in the latter year as compared with the former; that few firms made any substantial reduction in salaries and wages in the year 1931; and that in the face of general lower levels in business activity the market agencies were attempting to maintain their personnel and salaries at the levels obtained in the more prosperous year of 1929 (R. 82–83).

In paragraphs 129 and 130 of his order the Secretary found that there are more firms and a larger personnel on the Kansas City market than are necessary to dispose of shippers' livestock effectively; and that the unit costs of many of the firms

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[52] Appellants assert that the Secretary "did not find the existence of any monopolistic practice or of any practices affecting the free flow of interstate commerce." A finding in this form is not a condition precedent to the exercise of the power of the Secretary to prescribe reasonable rates. It is significant, however, that he found that appellants levied uniform charges on shippers (R. 64) and in view of this finding appellants' assertion that "the record shows that the market is free from all such [monopolistic] practices" (appellants' brief, p. 103) must be accepted with reservations.

are high because the volume of business coming into the market is divided among too many firms and handled by an unnecessarily large personnel (R. 90–91). In paragraph 131 of his order the Secretary found that conditions in the market tended to increase the costs of salesmanship and business getting and maintaining beyond reasonable levels (R. 91).

(3) *Findings as to the actual unit costs actually incurred*—As to all of the important functional unit costs, except salesmanship, the Secretary in his order set forth tables showing the actual unit costs incurred by each agency.[53]

With respect to salesmanship expense, the Secretary made specific findings as to the number of the

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[53] These findings are found on the following pages of the record: yarding salaries, pages 98–100; yarding expenses, pages 99–100; office salaries, pages 100–102; office expenses, pages 102–104; business getting and maintaining, pages 104–109; administrative and general expenses, pages 110–115; interest on capital, pages 117–120.

The Secretary did not set out in detail the actual costs of each appellant with respect to insurance, for the reason that the business practices of the various agencies as to carrying insurance were not comparable. Another reason for this was that the costs of the insurance items were definitely ascertainable through quotations of insurance companies. As to the other items, the Secretary did consider the costs of each appellant. This is demonstrated in paragraph 152 (R. 116), where the Secretary said:

> In considering the reasonable per head expense on account of some other functions the experience of each firm has been gone into and the normal arrived at on the basis of the experience of each individual firm.

salesmen who were employed in arm's length bargaining and the salary brackets into which they fall, and as to the volume of livestock which a competent salesman might be expected to sell under conditions which permitted him to operate in a reasonably efficient manner. These facts are the foundation for the Secretary's findings as to salesmanship costs. The Secretary did not make a finding as to the unit costs of salesmanship actually incurred by each market agency. In view of the abnormal competitive conditions existing in the Kansas City market which made it impossible for most salesmen, the competent as well as the inefficient, to operate in an efficient manner, a finding of this kind would have had little significance. Furthermore, the actual costs of salesmanship as set up on appellants' books included compensation for owner-salesmen which in most cases contained items of profit (even when the compensation was carried on the books as salary), and any computation of actual unit costs of salesmanship would necessarily have reflected these profit items and to that extent would have been misleading.

(4) *Findings as to the actual cost of management to those firms which employed managers and as to the cost of uninsurable risks* (R. 120–121)—These findings were used in making the allowances for reasonable unit profits.

(5) *Findings of reasonable unit costs and profits* (R. 122)—The finding of certain reasonable unit

costs necessarily carries with it the conclusion that any higher unit costs incurred by market agencies in the Kansas City market are unreasonable.

These findings furnish a complete and detailed explanation of the basis for the Secretary's conclusion that the existing rates were unreasonably high.[54] Nothing more is required. Certainly evidentiary findings need not be expressed in any special form of words nor need they conform to some indefinite standard of particularity as appellants seem to suggest.

Appellants complain that the Secretary did not find that "under the existing rates the compensation accruing to the owners of the agencies as a whole or to any of them was excessive" (appellants' brief, page 102). The Secretary's duty, however, was to determine whether or not rates were unreasonable and not whether profits were excessive. In view of his detailed findings as to actual costs and reasonable costs the absence of a finding as to excessive profits does not affect in any way the Secretary's ultimate conclusion as to the unreasonableness of the rates. Rates based on unreasonable costs may be unreasonable even though they do not

[54] In addition to the findings which have been described above and which relate particularly to the Secretary's conclusion that existing rates are too high, the Secretary's order contains detailed explanations and findings with respect to the business carried on by appellants in the Kansas City stockyards, the general conditions of the business, and the methods applied by the Secretary in determining unit functional costs and in prescribing rates.

produce excessive profits. The order clearly indicates that the Secretary found that in this case the existing rates were unreasonable not because they produced excessive profits but because they were based on costs which had been increased beyond all reasonable levels by the abnormal competitive conditions existing at the Kanas City market.

Appellants also complain that the Secretary did not find "that the rates charged exceeded the value of the service to the grower" (appellants' brief, page 102). Nothing in the Packers and Stockyards Act calls for a finding in precisely this form.

Indeed, it is highly doubtful if the concept of value of the service to shippers, as appellants appear to understand that concept, is capable of rational application in the kind of rate making involved in this case. There is no apparent test of that value which can be applied except the test of whether the rates are reasonable. Certainly, the value of the service cannot be determined, as appellants appear to believe, by establishing some mathematical relation between the rate charged and the value of the livestock sold. If the concept of value to the shipper has any meaning in this case, it can mean nothing more than that rates which are in fact unreasonable exceed the value of the service to the shippers. This is in accord with the intent of the Packers and Stockyards Act, which requires the Secretary to determine whether

rates are reasonable and provides that if they are unreasonable the shippers shall not be compelled to pay them, regardless of the mathematical relationship which may obtain between those rates and the value of the livestock sold. In this case the Secretary having determined, on the basis of complete and detailed evidentiary findings, that the existing rates are unreasonable, it was unnecessary for him also to find that the present rates exceed the value of the service to shippers. The findings cannot be defective because the Secretary having stated a proposition in one form then failed to restate the same proposition in another form. Tautology is not the test of the adequacy of the Secretary's findings. The question is whether they disclose the facts and the methods which he used in reaching his ultimate conclusion. The findings made by the Secretary in the instant case satisfy that test.

VIII

Appellants Had a Fair Hearing Which Fully Conformed With the Requirements of Due Process of Law and With the Statute

Appellants conclude their brief with an attack upon the regularity of the administrative proceedings upon which the Secretary's order was based, contending that the procedure was irregular, unfair, and violative of due process (appellants' brief, pp. 158–165). Their argument seems to rest upon three propositions: (1) that the Secre-

tary erroneously refused to adopt the practice of having the examiner make a tentative report to which appellants could file exceptions prior to argument before the Secretary; (2) that the District Court improperly struck from the petitions certain allegations to the effect that an Acting Secretary of Agriculture heard the oral arguments after each hearing on days when the Secretary of Agriculture was at his desk and neither sick, absent, nor disabled, and that under such circumstances the Acting Secretary was incompetent to function for the Secretary and hear oral arguments; and (3) that the District Court improperly struck from the petitions allegations made on information and belief to the effect that although the Secretary of Agriculture signed the order, he had not personally heard or read any of the evidence or considered oral arguments, and that his sole information about the case was derived from consultation with employees of the Department of Agriculture.[55]

Taking up first the argument based on appellants' request that the Secretary have the examiner prepare a tentative report to which appellants would be entitled to file exceptions, it is enough to say that such procedure is not required by the Packers and Stockyards Act nor have appellants pointed to any constitutional requirement that

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[55] The allegations covering these matters are contained in Section IV of the petitions (R. 4–6). On motion of the Government (R. 133–134) all of Section IV was stricken from the petitions by order of the District Court (R. 137–138).

such procedure be followed. It should also be noted that in the Omaha livestock commission rate proceeding which was involved in the case of *Tagg Bros. & Moorhead* v. *United States,* 280 U. S. 420, no tentative report was prepared by the examiner upon which the market agencies involved therein could base exceptions. Due process of law requires a fair hearing, but appellees know of no case in which it has been held that due process of law requires the particular type of procedure, involving a tentative report by an examiner, which appellants requested in the original proceedings herein. It is submitted that the District Court properly struck from the petitions the allegations that the Secretary's order was void because the Secretary had denied appellants' request for the preparation by the examiner of a tentative report.

Taking up next the contention that the District Court improperly struck from the petitions the allegations challenging the regularity of the proceeding on the ground that oral arguments had been heard after each hearing by an Acting Secretary of Agriculture, it is pertinent to note that the Acting Secretary of Agriculture who heard the oral arguments after each hearing was the Assistant Secretary of Agriculture whose duties are conferred by the Act of February 9, 1889 (U. S. C. A. Tit. 5, Sec. 517) which provides as follows:

> There shall be in the Department of Agriculture an Assistant Secretary of Agriculture, to be appointed by the President, by

> and with the advice and consent of the Senate, who shall perform such duties as may be required by law or prescribed by the Secretary. The Assistant Secretary of Agriculture is authorized to perform such duties in the conduct of the business of the Department of Agriculture as may be assigned by the Secretary of Agriculture.

The above Section obviously confers on the Assistant Secretary of Agriculture the power to perform such duties as may be assigned by the Secretary of Agriculture and it is not limited to the performance by the Assistant Secretary of mere ministerial matters. While it is true that the Secretary's findings refer to the oral arguments as having been heard by the Acting Secretary of Agriculture (R. 28, 33), this Court may judicially notice the facts that on the date of each of the oral arguments R. W. Dunlap and Rexford G. Tugwell, respectively, were the Assistant Secretaries of Agriculture, fully authorized by statute to perform such duties as the Secretary might assign to them irrespective of whether the Secretary himself was absent or disabled.

Clearly there is no support for the contention that an administrative officer, authorized by law to make quasi judicial decisions, cannot rely upon the assistance and advice of subordinate officers and departmental employees. In *Inhabitants of the Town of West Springfield* v. *Mayo,* 265 Mass. 41, 163 N. E. 653, one of the questions involved was

whether a zoning law had been legally approved by the Attorney General. The facts were that the town clerk submitted to an Assistant Attorney General a certified copy of the zoning by-law and a map. The Assistant Attorney General examined the by-law and map for about an hour, and the map never was submitted to the Attorney General. Subsequently, the by-law was returned to the town clerk bearing the approval of the Attorney General over his own signature. The contention was made that the map was an essential part of the by-law and that as a matter of law the Attorney General could not approve the by-law without having seen the map. Holding that the approval of the Attorney General was legal, the Court said (163 N. E. 654):

> Of course it is true, as the defendants contend, that "official duties involving the exercise of discretion and judgment for the public weal cannot be delegated. They can be performed only in person." *Brown* v. *Newburyport,* 209 Mass. 259, 266, 95 N. E. 504, 508 (Ann. Cas. 1912B, 495), and cases cited. *Obviously this rule goes no further than to require the official to exercise his own judgment and discretion upon matters which are committed to him for determination.* It does not inhibit the official's use of assistance when the act to be done requires an examination or inspection of documents or physical objects: *Nor does it prohibit the official from arriving at a conclusion of fact*

> *which is based upon the report of an assistant.* It was not necessary that the Attorney General should approve the map separate and apart from the by-law. Nor was it necessary to the exercise of his judgment that the map should have been physically before him or that he personally should have examined it and traced the boundaries of the various zones. It was sufficient that the map was examined with the by-law for him, by one of his legal assistants; and that, receiving the report of his assistant, upon his own judgment he approved the by-law of which the map was an integral part. [Italics supplied.]

The above case is squarely in point and it enunciates a legal principle which must be the general law on this subject if administrative government is effectively to function. See also *Hisey* v. *Peters* (1896), Patent Decisions, page 22.

In the case of *In Re Jem Yuen*, 188 Fed. 350 (Dist. Ct. Mass. 1910), which arose on petition for habeas corpus, one of the questions involved was whether it was improper for the Secretary of Commerce and Labor in making an administrative decision to consider a "Memorandum for the Acting Secretary" which had been signed by the Commissioner General and which contained remarks on the evidence and a recommendation that the decision be affirmed. In reviewing the proceeding the court said (p. 354):

> I do not see how it can be contended that anything material to the decision, and not

> previously presented and discussed at the hearing, was brought into the case for the first time either by the memorandum or by the letter referred to. Nor do I think that the memorandum can be considered as indicating in any way that the officer whose duty it was to hear and determine the appeal did not hear and determine it himself. It cannot be said that the head or the acting head of a department, charged with such a duty, is forbidden to have a subordinate make a preliminary report on it for his guidance.

Appellants appear to accept the propriety of the procedure authorized by the Act for the taking of testimony before examiners appointed by the Secretary. If, as appellants contend, it was incumbent upon the Secretary to hear oral arguments personally, it would seem likewise incumbent upon him, and far more important, personally to hear the testimony of the witnesses.

The fact is, however, that the Act expressly provides in Section 402 that "The Secretary, *in person or by such agents as he may designate,* may prosecute any inquiry necessary to his duties under this Act in any part of the United States" (Italics supplied), and in Section 407 that "The Secretary—shall have the power to appoint, remove, and fix the compensation of such officers and employees * * * as shall be necessary to the administration of this Act * * *." It is plain that the Act contemplated that testimony should be taken by such examiners and agents as the Secretary des-

ignated, and indeed it is obvious that this is the only practicable procedure that could possibly be provided.

The Act, moreover, does not expressly provide for oral argument before the Secretary at all. The provisions with respect to hearing are found in Section 310 of the Act which provides that "Whenever after full hearing upon a complaint * * * or after full hearing under an order for investigation and hearing made by the Secretary on his own initiative," the Secretary is of the opinion that existing rates are unreasonable, he may exercise his rate-making powers, etc.

Thus, the only requirement of the statute in this respect is that there be a *full hearing,* and in view of the two hearings in this case which lasted in the aggregate more than 3½ months and at which thousands of pages of testimony were taken and numerous exhibits put in evidence, it is patent indeed that the suggestion that appellants did not have a full hearing is frivolous.

Taking up finally the contention that the District Court erred in striking the allegations made on information and belief to the effect that the Secretary of Agriculture had not read the record, the briefs, or considered the oral arguments, the best answer to this contention is found in the language of the District Court when it said:

> We think it is unnecessary now to elaborate the obvious observation that the theory of these allegations is supported by nothing in

> the Act and that a construction of the Act consistent with that theory would destroy it altogether as a measure capable of practical administration. [R. 148.]

In *United States* v. *Great Northern Ry.*, 287 U. S. 144, the argument was made in seeking to void a certificate issued by the Interstate Commerce Commission that the certificate had been issued without the Commission having first made certain studies required to be made by the statute as a basis for action. Although this Court did not pass upon the question whether the finality of the Commission's certificate could be questioned on such grounds, the following observation of this Court suggests the possible involvements of this argument. This Court said (p. 155):

> A word of answer is still due to the argument of the government that the certificate is void because the work of the commission was so hasty and imperfect as to involve an abdication of its statutory duty. *Without probing at this time the legal implications of this argument,* we find it without adequate basis in the facts. [Italics supplied.]

It would indeed be a novel and dangerous doctrine if parties affected by administrative decisions, by alleging upon information and belief that the administrative tribunal had not given pending matters careful consideration or had signed orders upon insufficient deliberation, could go behind such orders and compel the members of such tribunals to

testify in court as to the adequacy of the consideration given by them to the issues involved. It might well lead to the paralysis of administrative tribunals if their members were constantly having to answer subpoenas to testify as to whether they had fully read the record in particular cases, whether they had consulted privately with experts who had worked on the case, whether they had accepted the recommendations of certain officials who had given minute and careful study to the issues involved, and numerous other questions pertaining to the mechanics of reaching a decision and preparing an order in an administrative matter. It is enough that public officials are presumed to be conscientious and to do their duty, and that they take full legal responsibility for their decisions.

The cases cited by appellants (*Southern Ry. Co.* v. *Virginia,* 290 U. S. 190; *Interstate Commerce Commission* v. *Louisville & Nashville R. R. Co.,* 227 U. S. 88, 91; *Crowell* v. *Benson,* 285 U. S. 22, 56–57) are not in point. Those cases merely hold that due process of law requires a fair hearing—a general proposition of undisputed validity.

Appellants are wholly unjustified in asserting that the Government admitted "that the Secretary had never read, heard, or considered the record, or any part of it" (appellants' brief, p. 161). The Government moved to strike these allegations believing them to be impertinent and frivolous, and the motion to strike was granted. It is elementary

that a motion to strike only admits the truth of the allegations for pleading-purposes in order to secure a ruling upon their legal adequacy. There is no warrant for appellants' position that by moving to strike these allegations the Government admitted their truth in the same sense that would attach to an admission in an answer.

CONCLUSION

It is respectfully submitted that the decree of the District Court should be affirmed.

STANLEY REED,
Solicitor General.
JOHN DICKINSON,
Assistant Attorney General.
WENDELL BERGE,
HENRY MCCLERNAN,
H. B. COX,
Special Assistants to the Attorney General.
JAMES C. WILSON,
Special Attorney.
G. N. DAGGER,
Attorney, Department of Agriculture.

APRIL 1936.

APPENDIX A

Title III of the Packers and Stockyards Act, 1921, c. 64, 42 Stat. 159 (7 U. S. C., Title 7, Secs. 181–229) provides in part as follows:

SEC. 301. When used in this Act—

(a) The term "stockyard owner" means any person engaged in the business of conducting or operating a stockyard;

(b) The term "stockyard services" means services or facilities furnished at a stockyard in connection with the receiving, buying, or selling on a commission basis or otherwise, marketing, feeding, watering, holding, delivery, shipment, weighing, or handling in commerce, of livestock;

(c) The term "market agency" means any person engaged in the business of (1) buying or selling in commerce livestock at a stockyard on a commission basis or (2) furnishing stockyard services; and

(d) The term "dealer" means any person, not a market agency, engaged in the business of buying or selling in commerce livestock at a stockyard, either on his own account or as the employee or agent of the vendor or purchaser.

* * * * *

SEC. 304. It shall be the duty of every stockyard owner and market agency to furnish upon reasonable request without discrimination, reasonable stockyard services at such stockyard * * *.

SEC. 305. All rates or charges made for any stockyard services furnished at a stock-

yard by a stockyard owner or market agency shall be just, reasonable, and nondiscriminatory, and any unjust, unreasonable, or discriminatory rate or charge is prohibited and declared to be unlawful.

* * * * *

SEC. 310. Whenever after full hearing upon a complaint made as provided in section 309 or after full hearing under an order for investigation and hearing made by the Secretary on his own initiative, either in extension of any pending complaint or without any complaint whatever, the Secretary is of the opinion that any rate, charge, regulation, or practice of a stockyard owner or market agency, for or in connection with the furnishing of stockyard services, is or will be unjust, unreasonable, or discriminatory, the Secretary—

(a) May determine and prescribe what will be the just and reasonable rate or charge, or rates or charges, to be thereafter observed in such case or the maximum or minimum, or maximum and minimum, to be charged, and what regulation or practice is or will be just, reasonable, and nondiscriminatory to be thereafter followed; and

(b) May make an order that such owner or operator (1) shall cease and desist from such violation to the extent to which the Secretary finds that it does or will exist; (2) shall not thereafter publish, demand, or collect any rate or charge for the furnishing of stockyard services other than the rate or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be; and (3) shall conform to and observe the regulation or practice so prescribed.

* * * * *

SEC. 313. Except as otherwise provided in this Act, all orders of the Secretary under this title, other than orders for the payment of money, shall take effect within such reasonable time, not less than five days, as is prescribed in the order, and shall continue in force until his further order, or for a specified period of time, according as is prescribed in the order, unless such order is suspended or modified or set aside by the Secretary or is suspended or set aside by a court of competent jurisdiction.

SEC. 315. If any stockyard owner, market agency, or dealer fails to obey any order of the Secretary other than for the payment of money while the same is in effect, the Secretary, or any party injured thereby, or the United States by its Attorney General, may apply to the district court for the district in which such person has his principal place of business for the enforcement of such order. If, after hearing, the court determines that the order was lawfully made and duly served and that such person is in disobedience of the same, the court shall enforce obedience to such order by a writ of injunction or other proper process, mandatory or otherwise, to restrain such person, his officers, agents, or representatives from further disobedience of such order or to enjoin upon him or them obedience to the same.

SEC. 316. For the purposes of this title, the provisions of all laws relating to the suspending or restraining the enforcement, operation, or execution of, or the setting aside in whole or in part the orders of the Interstate Commerce Commission, are made applicable to the jurisdiction, powers, and duties of the Secretary in enforcing the pro-

visions of this title, and to any person subject to the provisions of this title.

TITLE IV

SEC. 402. For the efficient execution of the provisions of this Act, and in order to provide information for the use of Congress, the provisions (including penalties) of sections 6, 8, 9, and 10 of the Act entitled "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," approved September 26, 1914, are made applicable to the jurisdiction, powers, and duties of the Secretary in enforcing the provisions of this Act and to any person subject to the provisions of this Act, whether or not a corporation. The Secretary, in person or by such agents as he may designate, may prosecute any inquiry necessary to his duties under this Act in any part of the United States.

* * * * *

SEC. 407. The Secretary may make such rule, regulations, and orders as may be necessary to carry out the provisions of this Act and may cooperate with any department or agency of the Government, any State, Territory, District, or possession, or department, agency, or political subdivision thereof, or any person; and shall have the power to appoint, remove, and fix the compensation of such officers and employees, not in conflict with existing law, and make such expenditures for rent outside the District of Columbia, printing, telegrams, telephones, law books, books of reference, periodicals, furniture, stationery, office equipment, travel, and other supplies and expenses as shall be necessary to the administration of this Act in the District of Co-

lumbia and elsewhere, and as may be appropriated for by Congress, and there is hereby authorized to be appropriated, out of any money in the Treasury not otherwise appropriated, such sums as may be necessary for such purpose.

APPENDIX B

Comparison of gross commissions (less seconds' commissions) with total non-salary expense for business getting and maintaining

Firm no.		Gross commissions less seconds	Business getting and maintenance	Percentage relation
1	Fred O. Morgan Com. Co	$3,600.00	$502.00	13.94
4	Ragland, Storts & Burrus Com. Co	21,386.00	4,773.00	22.32
5	Hinie Klecker Sheep Com. Co	17,539.00	4,060.00	23.15
6	Lewis-Flourney Live Stock Com. Co	11,644.00	1,345.00	11.55
7	Grover C. Maxwell Com. Co	19,238.00	1,949.00	10.13
9	John M. Nichols Live Stock Com. Co	5,557.00	246.00	6.92
11	L. B. Andrews Live Stock Com. Co	1,712.00		
12	Bowles Live Stock Com. Co	43,939.00	7,183.00	16.55
13	Crider Bros. Com. Co	45,877.00	6,094.00	13.28
14	Chas. Dixon Com. Co	31,308.00	4,183.00	13.36
15	Elliott Swain & Co	14,578.00	577.00	3.96
16	Farrar, Davis & Campbell Com. Co	18,661.00	1,608.00	8.62
17	Gladish Live Stock Com. Co	7,928.00	715.00	9.02
18	Haggart, Wilson Com. Co	36,193.00	4,042.00	11.17
19	W. E. Burrus, Interstate Com. Co	7,919.00	1,403.00	17.72
20	Kansas City Live Stock Com. Co	19,322.00	2,632.00	13.62
23	Fern O. Sanders Com. Co	19,541.00	2,154.00	11.02
25	C. A. Stuart & Co	35,706.00	4,557.00	12.76
26	Webster Bros. & Smith Com. Co	20,122.00	3,590.00	17.84
29	Stagner, Pierronett & Willis Com. Co	17,258.00	1,418.00	8.22
30	Tamblyn Com. Co	15,236.00	1,467.00	9.63
33	Henry Carnus Com. Co	1,523.00	138.00	9.06
34	Warren Cummings Com. Co	28,322.00	4,100.00	14.48
35	Drumm Standish Com. Co	43,046.00	9,167.00	21.30
37	Link Fasken Com. Co	993.00	54.00	5.44
42	Long & Perry Com. Co	38,573.00	8,185.00	21.22
43	Knight & Tice Sheep Com. Co	17,418.00	4,543.00	26.08
44	W. M. Leitch Sheep Com. Co	27,606.00	5,555.00	20.12
46	National Livestock Com. Co	87,649.00	11,388.00	12.99
48	Poole, Dempsey, Rutherford Com. Co	26,987.00	2,252.00	8.34
51	Harry Kennaley Com. Co	52,314.00	5,503.00	10.52
52	Jefferson, Lowry, Davis Com. Co	13,865.00	1,999.00	14.42
53	Ehrke-Martin Com. Co	23,669.00	4,805.00	20.30
54	John Clay & Co	152,777.00	26,237.00	17.17
55	Baucus & Co	40,032.00	4,517.00	11.28
56	Robinson, Hoover Com. Co	23,113.00	1,409.00	6.10
59	Swift & Henry Com. Co	121,412.00	18,038.00	14.86
60	H. Thies & Son	16,909.00	1,460.00	8.63
61	Ham Knighton Com. Co	7,058.00	580.00	8.22
62	Laird Bros. Com. Co	22,903.00	6,642.00	29.00
63	Martin, Blomquist & Lee Com. Co	102,215.00	23,668.00	23.16
65	Moffett Com. Co	24,404.00	1,640.00	6.72
66	Jay D. McCormack Live Stock Com. Co	1,983.00	45.00	2.27

Comparison gross commissions (less seconds' commissions) with total B. G. & M. expense (non-salary)—Continued

Firm no.		Gross commissions less seconds	Business getting and maintenance	Percentage relation
67	W. H. Peed Live Stock Com. Co	2,162.00	61.00	2.82
70	W. C. Kile Live Stock Com. Co	25,526.00	4,887.00	19.15
71	Ryan-Robinson Com. Co	39,523.00	5,389.00	13.64
72	Welch Live Stock Com. Co	1,674.00	69.00	4.12
73	Witherspoon Live Stock Com. Co	49,321.00	9,995.00	20.27
74	F. Buddington Com. Co	5,844.00	746.00	12.77
75	W. M. Curtis & Co	15,978.00	1,827.00	11.43
76	Greer & Co	7,934.00	78.00	.98
77	Inman, Hutton Com. Co	14,927.00	1,779.00	11.92
78	Walter C. Land Live Stock Com. Co	7,455.00	850.00	11.40
79	Less White Live Stock Com	7,197.00	720.00	10.00
82	Wilson Egan & Co	64,962.00	10,299.00	15.85
83	Burlington Com. Co	68,266.00	8,429.00	12.35
84	Cassidy Southwestern Com. Co	51,872.00	6,416.00	12.37
87	Dave Hamer	8,884.00	977.00	11.00
88	Ira Kimmons Com. Co	1,832.00	852.00	46.51
10	Producers Com. Assn	101,283.00	24,810.00	24.50
36	Farmers Union Live Stock Com. Co	99,132.00	9,149.00	9.23
	Total	1,862,827.00	283,756.00	15.22

These figures are taken from Gov. Ex. 115, p. 31.

NOTE.—Seconds are consignments purchased by traders and again placed with market agencies for sale—therefore not subject to duplicate distribution for B. G. & M. expense.

APPENDIX C

IV. Sample analysis of variation between per-head costs as found by the Government accountant and as finally determined by the secretary. (Yarding salaries charged to cattle and calves)

Firm	Yard salary			Adjustments made by Secretary				Order (R. 98) per head 7+2
	(1) Amount	(2) Head	(3) Per head	(4) Eliminate owners' salary	(5) Eliminate nonowner salesmen	(6) Add nonowner yard a/c sell	(7) Final yard sal. =1−(4+5)+6	
4	$3,405.60	35,763	$0.0952		$712.50	$506.00	$3,199.10	$0.0895
6	1,366.74	15,841	.0863	$180.00	90.00	218.75	1,315.49	.0830
7	2,273.62	15,790	.1440	562.50	371.32	796.50	2,136.30	.1353
9	120.74	3,113	.0388				120.74	.0388
11	400.00	1,878	.2130				400.00	.2130
12	5,260.05	67,947	.0774		1,505.70	1,080.00	4,834.35	.0711
13	8,158.40	63,945	.1276	402.90	601.50	1,065.60	8,219.60	.1285
14	6,136.39	42,094	.1458	1,149.97	2,015.01		2,971.41	.0706
15	1,797.26	14,983	.1200	275.46	1,056.00		465.80	.0311
16	2,450.25	26,673	.0919	960.00		375.00	1,865.25	.0699
17	1,419.35	11,336	.1252	418.50		584.50	1,585.35	.1399
18	6,173.67	59,107	.1044	2,000.00	330.00		3,843.67	.0650
19	1,908.66	12,570	.1518	350.12	344.99	184.04	1,397.59	.1112
66	164.93	3,656	.0451	141.38			23.55	.0064
67	127.75	454	.2814	121.40			6.35	.0140
				(A)	(B)	(C)		

Note A (column A).—In the original study a questionnaire was used to distribute salaries—Part of owner's salesmen's and buyer's time was allocated to yarding function. These amounts were restored to selling and buying for consideration in the Secretary's order. Only those employees devoting the major part of their time to yard functions were left in yard salary expense.

Note B (column B).—In the original distribution based on the questionnaire—a part of nonowner salesmen's and buyers' time was allocated to yarding function. These amounts were restored to selling and buying for consideration in the Secretary's order. Only those nonowner employees devoting the major part of their time to yard functions were left in yard salary expense.

Note C (column C).—In the original distribution based on the questionnaire—a part of nonowner yardmen salaries was allocated to selling or buying. These amounts were restored to yarding in the Secretary's order. The major part of the time of these yardmen having been devoted to yard functions—the amount allocated to selling or buying in the cost study, was restored to yard salary expense.

All figures taken from Government exhibit 115, p. 7, and 115 B, except final unit costs (R. 98).

EXPLANATION OF APPENDIX C

For example, the accountant, in determining the actual per head functional cost for Firm No. 6

included in his total functional cost $180.00 on account of a portion of owner's salary charged by the accountant to the yarding function, and $90.00 on account of a portion of non-owner salesmen's time; the Secretary, in following his policy of charging all of a man's time to the function to which a major part of his time was devoted, deducted said allowance of $180.00 and $90.00 from the total functional cost found by the accountant. Similarly, the accountant charged $218.75 of a yardman's salary to some other function (to which a portion of the man's time had been devoted) and the Secretary, for the same reason returned said amount to yarding salaries, adding it to the total functional cost found by the accountant. These operations resulted in a total functional cost as determined by the Secretary in the sum of $1,315.49; this amount, divided by the total number of head, resulted in the functional unit cost appearing in paragraph numbered 144 of the Secretary's order (R. 98). Functional unit costs for other firms were determined by the Secretary in the same manner.

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